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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit, to the end that this Court may review a decision which that Court has rendered in a case involving the parties above-named. And the Petitioner respectfully shows to this Court:

QUESTIONS PRESENTED FOR REVIEW

1. Does the National Labor Relations Board have jurisdiction over a dispute concerned solely with the construction and application of the collective bargaining agreement between the parties?
2. Did the court of appeals err in refusing to apply the standards of Section 502 of the Labor Management Relations Act, 29 U.S.C. §143, to the facts of this case?
3. Did the court of appeals err in finding Semancik's and Robert's refusal to work under a claim of unsafe conditions protected "concerted activity" under Section 8 (a) (1) of the National Labor Relations Act, 29 U.S.C. §158(a) (1)?
4. Is it a violation of Section 8(a) (1) of the National Labor Relations Act for an employer to discipline an employee who refuses to work under a claim of unsafe conditions when there is a collective bargaining agreement containing a no-strike clause, the discipline and claim of unsafe conditions are subject to binding arbitration, and there is no anti-union animus on the part of the employer?
5. May back pay be awarded for a period when employees admittedly would have refused to work under a claim of unsafe conditions and it has not been shown that conditions were in fact unsafe?

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REFERENCES TO OPINIONS OF COURTS BELOW AND ADMINISTRATIVE AGENCIES:

1. Decision of Administrative Law Judge, Paul Bisgyer, dated December 11, 1978.

2. Decision of the National Labor Relations Board, dated April 30, 1979, adopting the recommendations of the Administrative Law Judge.

3. Opinion of the Third Circuit Court of Appeals, dated April 14, 1980.

JURISDICTION OF THIS COURT

The judgment of the Third Circuit Court of Appeals is dated April 14, 1980 and was entered May 21, 1980.

The Petition for rehearing was denied on July 2, 1980.

Jurisdiction to review, by Writ of Certiorari, the judgment of the court of appeals is conferred on this Court by the provisions of 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Provisions of United States statutes pertinent to this case are as follows:

> "Employees shall have the right to ... engage in other concerted activities for the purpose of ... mutual aid or protection ..."
>
> 29 U.S.C. §157; Section 7 National Labor Relations Act

> "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title(.)"
>
> 29 U.S.C. §158(a) (1); Section 8(a) (1) National Labor Relations Act

> "... (N)or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."
>
> 29 U.S.C. §143; Section 502 Labor Management Relations Act

STATEMENT OF THE CASE

At its Allenport, Pennsylvania works, Wheeling-Pittsburgh operates a number of travelling electrical overhead cranes. The crane in this case is in the tube mill, a large building in which oil well pipe is manufactured. The crane, which is approximately 30 feet above ground, is used to move the product through various stages of manufacture and to load it onto railroad cars, which are brought inside the building. The crane rides the length of the 700-foot building on two parallel rails, one on each side of the building. A bridge formed by two

girders spans the 120-foot width of the building. The cab for the crane operator is attached to the bridge. The girders rest on wheels at each end which roll on the rails. Two wheels are motor driven and two are idlers. Without the services of the crane, the mill cannot operate.

The employee who filed the charge in this case, Edmond Semancik, is a crane operator. On September 19, 1977, early in the shift, he complained to supervisors and to the crane repairman, a bargaining unit employee, that the crane was bumping and sliding on the rails, that he believed the cause to be a flake of metal missing from the surface of the wheel, usually called a spall on the wheel, and that he was refusing to operate the crane pursuant to Section 14(C) of the labor agreement.[1]

Several members of supervision, experts in crane safety and operation, inspected the crane. The investigation revealed that the sensations experienced by Semancik were a result of moisture on the rails and the crane being out of alignment. Correction of these problems was a routine matter, and it was performed immediately. An examination of the wheel itself as it rolled over the rail revealed that the spall was not contacting the rail. Rather, the wheel was contacting the rail in a completely normal manner and it was a physical impossibility for the spall to be causing any bumping. The wheel presented no danger and, particularly, it presented no condition unsafe or unhealthy beyond the normal hazards inherent in the operation. In fact, the condition of the wheel had been known to supervisors and bargaining unit inspectors for some time, and it had been noted in the crane log on May 18, 1977. Under long established procedures, the

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1. Section 14(C) provides that an employee who believes he or she is being required to work under conditions which are "unsafe or unhealthy beyond the normal hazard inherent in the operation" shall have the right to relief from the job and to have all claims related to the matter heard by an arbitrator under an expedited procedure for such cases. Section 14(C) is in the labor contracts of all basic steel companies in the United States.

wheel would not be replaced until scheduled maintenance down-time or unless the spall enlarged to the point it caused bumping. Semancik himself had operated the crane with the spalled wheel for 34 shifts prior to September 19, 1977, with no problems.

Semancik was informed of the results of the numerous inspections of the wheel and the crane's operation, the realignment of the crane, and the sanding of the rails. He refused to accept the evaluation of the experts and the normal maintenance prodecure, refused to reexamine the crane following the corrective action, refused to take a trial run, and continued to claim a right to refuse to work based on Section 14(C) of the labor agreement. As a result, he was given a five-day suspension, subject to the imposition of further discipline following an investigative hearing at the end of the five days, in accordance with the requirements of the labor agreement.

After it became clear that Semancik was not going to work and the decision was made to suspend him, efforts were made to secure another craneman. Francis Roberts was brought to the scene after the suspension, before Semancik left the building. Upon being advised by supervisors of the facts as already related and following a private conversation with Semancik, Roberts, without making any investigation of the crane other than to look up at it from the floor, refused to work. He also was suspended for five days, subject to the possibility of further discipline following an investigative hearing.

No other qualified operators were present. The mill was shut down and all employees sent home for the remainder of the shift. The operator for the next shift was advised of what had happened by representatives of the company and the union and he and all other cranemen operated the crane with the spalled wheel for 19 more days or approximately 55 shifts without incident or problems of any kind. On October 9, 1977, the wheel was replaced in accordance with the usual practice, during scheduled maintenance down-time.

Semancik's investigative hearing was attended by Semancik, union officials, the supervisors involved in the

incident, and the plant industrial relations superintendent. At the hearing, no new evidence was presented, except that Semancik stated he would refuse to work despite any assurances that anyone might give him that the wheel was safe.

It was the consensus of the supervisors that Semancik's continued refusal to work had been unreasonable and unsupported by the contract, and that a 30-day suspension would be appropriate. The same conclusion and suspension was the result of Roberts' hearing and Roberts similarly refused to work until the wheel was replaced. A grievance was filed immediately and, later, a charge with the National Labor Relations Board.

The Administative Law Judge ("ALJ") found that by suspending the employees because of their refusal to operate the crane which they believed to be unsafe "beyond the normal hazard inherent in ... (its) operation" and their request to be relieved of their assignments pursuant to the terms of the collective bargaining agreement, the employer violated Section 8(a) (1) and Section 8 (a) (3) of the National Labor Relations Act ("the Act"). As part of the remedy, Semancik and Roberts were awarded back pay consisting of any loss of earnings, plus interest, which they had suffered as a result of the suspensions. The back pay award was made despite the fact that Semancik and Roberts both asserted at their investigative hearings that they would continue to refuse to work until the wheel was replaced; hence, back pay was awarded for the period prior to the replacement of the wheel, when both employees admittedly would not have come to work.

The National Labor Relations Board ("the Board") affirmed the rulings, findings, and conclusions of the ALJ and adopted his recommended order.

The Third Circuit Court of Appeals, which received the case on Wheeling-Pittsburgh's petition for review, also held that Semancik and Roberts had been unlawfully suspended. Three determinations comprised this holding: First, the court determined that the employees were engaging in "concerted activity" for mutual aid or pro-

tection, for the purposes of Section 7 of the Act; secondly, the court determined that there was substantial evidence on the record as a whole that the "concerted activity" was accomplished with a sincere belief and a reasonable basis in fact; finally, based upon the two previous determinations, and despite a finding that there was no anti-union animus on the part of the employer, the court determined that the suspensions of the employees violated Section 8(a) (1) of the Act. Although the court found the suspensions unlawful and upheld the Board's order insofar as it related to the suspensions, the court never expressly addressed the question of the back pay award for the time when the allegedly unsafe working condition existed.

REASONS FOR THE ALLOWANCE OF THE WRIT

From the inception of this case, the company has taken the position that there has been no unfair labor practice, and the Board has no jurisdiction to hear the dispute. This case involves interpretation of the contract under which Semancik and Roberts claimed a right to refuse to work, and federal labor policy clearly requires that the contract grievance procedure be utilized for redress. Moreover, by prematurely involving itself in this contract dispute, the Board has infringed on the contractual rights of both the company and the union to have such disputes resolved in arbitration.

Congress passed the Taft-Hartley amendments to the Act with the intention that the Board should not be given jurisdiction in the case of a contract dispute. Thus, the House Conference Report (No. 510, p. 22) on the Taft-Hartley amendments (H.R. 3020) stated:

> The Senate amendment contained a provision which does not appear in Section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement or an agreement

> to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once the parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board. *I Leg. History of the Labor Management Relations Act of 1947,* pp. 545-46, cited in *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 511 (1962).

Likewise, the Senate Report emphasized that the Board should

> ... develop ... a policy of entertaining under these provisions only such cases alleging violation of contract as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration or if necessary, by litigation in court ... Any other course would engulf the Board with a vast number of petty cases that could best be settled by other means. In short, the intention of the committee in this regard is that cases of contract violation be entertained on a highly selective basis, when it is demonstrated to the Board that alternative methods of settling the dispute have been exhausted or are not available. S. Rep. No. 105, 80th Cong., 1st Session, p. 23, *I Leg. History of the Labor Management Relations Act of 1947,* p. 429.

In support of this expressed Congressional intent, the Supreme Court has announced firm policies regarding the status and use of labor contract grievance procedure. In *USWA v. American Mfg. Co.,* 363 U.S. 564, 566 (1960), the Court stated:

> Section 203 (d) of the Labor Management Relations Act, 1947, ... 29 U.S.C. §173 (d)

states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement ..." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

Also, the Court stated in *Republic Steel Corp. v. Maddox,* 370 U.S. 650, 652-653 (1965):

> As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to

> protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' (Footnotes and citations omitted; emphasis is original.)

Moreover, in the case of *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427-28 (1967), the Supreme Court elaborated on the Board's lack of jurisdiction in many cases where there is a contractual claim which does not involve an unfair labor practice:

> ... Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements ... To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.

It is important to note that the *C & C Plywood* case involved an employer's unilateral change of a wage system, an unfair labor practice. The Supreme Court held that the

Board could not be prevented from determining the merits of the unfair labor practice charge merely because the company asserted in defense that the action which allegedly violated the Act was privileged by a collective bargaining agreement. But, the Court said that permitting the Board to adjudicate the contract question in such circumstances "was in no way inconsistent with ... (a) previous recognition of arbitration as 'an instrument of national labor policy for composing contractual differences.' " 385 U.S. at 426. Thus, the Board could interpret the contract only to the extent "necessary to determine that the union did not agree to give up ... statutory safeguards" under the Act. 385 U.S. at 428. The Court relied on the fact that "the parties have not provided for arbitration;" the union would have had to go to court for an interpretation of the contract; and, if it succeeded in court, the union would then have to go back to the Board to begin an unfair labor practice proceeding. 385 U.S. at 429-30.

Unlike the *C & C Plywood* case, where the Board found that a contract provision did not waive statutory bargaining rights under the Act, in the instant case, the ALJ found that because the company deprived Semancik and Roberts of their claimed contract rights, the company violated the employees' statutory rights.

NLRB v. Strong, 393 U.S. 357 (1969), also serves to illustrate the difference between a case where the Board could interpret the provisions of the collective bargaining agreement and the instant case. In *Strong,* the Court held that, having found an employer's refusal to sign a collective bargaining agreement to be an unfair labor practice, the Board could then interpret the provisions of that agreement to ascertain the benefits which would have been paid under the contract if the employer had rightfully signed. 393 U.S. at 362. The Court pointed out:

> Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally en-

> forced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts ... Arbitrators and the courts are still the principal sources of contract interpretation, but the Board may proscribe conduct *which is an unfair labor practice* even though it is also a breach of contract remediable as such by arbitration and in the courts ... It may also, *if necessary to adjudicate an unfair labor practice,* interpret and give effect to the terms of a collective bargaining contract ... (393 U.S. at 360-61, ftnt. omitted, emphasis added.)

Thus, in *Strong* the Board was permitted to interpret the contract in order to ascertain the appropriate remedy for an unfair labor practice which did not involve contract interpretation issues; in contrast, in the instant case, the Board has elevated a contract dispute to the status of an unfair labor practice. In doing so, the Board has acted in contradiction to expressed Congressional intent and the clear bounds of its own authority as described by this Court.

Aside from the issue of the Board's exercise of jurisdiction in this case, the analysis which the court of appeals applied in reviewing the Board's decision was based upon a misinterpretation of what law is applicable. The court of appeals based its analysis on Section 7 of the Act. However, this case involves unionized employees working under a contract with a no-strike clause, so that Section 7 is not the relevant statute. Rather Section 502 of the Labor Management Relations Act should have been applied.

The application of Section 7 is distinct from that of Section 502. The Court's decision in *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962), a work stoppage case where Section 7 was applied, shows the distinction drawn by the Court when there is no alleged contractual prohibition of such a work stoppage. The Court in *Washington Aluminum* emphasized:

> The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under the circumstances, they had to speak for themselves as best they could ... having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. 370 U.S. at 14-15.

As a consequence of these bounds of Section 7 coverage, "(f)or unionized employees the inclusion of a no-strike provision in their collective bargaining agreement will generally preclude Section 7 protection of work stoppage due to safety hazards.[2]

In contrast to Section 7's coverage, Section 502 protects unionized employees working under a contract with a no-strike clause, and its protection is limited:

> Section 502 is the unionized employees' counterpart to Section 7, applicable to employees subject to a no-strike clause. However, its protections are far more restrictive and may not protect employees if they leave work under the misapprehension that abnormally dangerous conditions exist.[3]

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2. K. Kirschner, "Workers in a *Whirlpool:* Employees Statutory Rights to Refuse Hazardous Work," *Labor Law Journal,* Vol. 31, No. 5 (May, 1980), pp. 284-5. Also, see the NLRB General Counsel's Advice Memorandum, *Economy Tank Line,* Case No. 9-CA-12066 (1979), 1978-79 CCH NLRB para. 20,223, wherein this notion is explicitly stated.

3. *Ibid.,* p. 285

The test for the application of Section 502 protection was enunciated by the Board in *Redwing Carriers,* 130 NLRB 1208 (1961), 1961 CCH NLRB para. 9748:

> What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered abnormally dangerous.

This Court reaffirmed this test in *Gateway Coal Company v. United Mineworkers of America,* 414 U.S. 368, 385-387 (1974), where it reversed the Third Circuit, stating:

> The Court of Appeals majority erred, however, in concluding that an honest belief, no matter how unjustified, in the existence of "abnormally dangerous conditions for work" necessarily invokes the protection of §502. If the Courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers ... Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be. We agree with (dissenting Judge Rosenn) that a union seeking to justify a contractually prohibited work stoppage under §502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." ... We find this reading of the statute consistent ... with common sense ...

Section 502 offers a limited range of protection which can be invoked only by the strict evidentiary standard of *Gateway Coal;* otherwise, the contract's no-strike clause precludes the walkout. This standard, which contemplates a genuine threat of serious injury or death, is the same

standard applied by arbitrators, whether or not the Section 14(C) contract safety provision exists. For example, in *In the Matter of Arbitration between Crucible, Inc., Midland Div. and United Steelworkers of America (Local 1212)* Decision CK-8, Grievance #7283 (Oct. 1, 1974), (Killingsworth),[4] there was no Section 14(C) provision, but the arbitrator interpreted the contract to permit an employee to refuse a work assignment because of a good-faith belief regarding the existence of a serious safety hazard. Arbitrator Killingsworth stressed that "good faith" in labor relations does not include simply sincere belief; rather, he stated:

> The Umpire believes that the key to this case lies in the proper definition of the phrase, "in good faith." It is sometimes too narrowly defined to mean simply, acting on the basis of sincere belief and without ulterior motives. A sincere belief may not be enough to establish good faith as this term is commonly understood in labor relations. It is not consistent with good faith to have a closed mind which is completely unresponsive to facts that are inconsistent with a sincerely-held belief.
>
> ...
>
> In summary, then, the Company may not properly discipline an employee who refuses a work assignment because of a good-faith belief that a serious safety hazard, over and above the normal occupational risks, is involved in the assignment ... A good-faith belief in a serious safety hazard, however, involves more than a sincere conviction and an absence of ulterior motive. The concept of good faith in labor relations involves a willingness to give con-

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4. A copy of this and all other arbitration decisions cited in this petition were put into evidence.

> sideration to relevant facts and to change a previous position if the facts are clearly inconsistent with that position. Simply asserting the existence of "unsafe conditions" on a job without providing any specifics, without considering recent changes on the job, and without considering the contrary conclusions of qualified inspectors, is inconsistent with the concept of "good faith."

Equally persuasive in this regard are the arbitration decisions which deal with *the same Section 14(C) language present here.* These decisions involved grievances filed by members of Steelworkers locals against United States Steel Corporation. In *United States Steel Corporation (Homestead Works) and USWA (Local 1397),* Case Nos. USS-7527-H and USS-7528-H, Grievance Nos. HH-69-133, HH-69-134, (July 16, 1970), (Friedman), the arbitrator held with respect to the Section 14(C) good faith test:

> Good faith is not established merely by an assertion. While it is necessarily subjective, it must have some reasonable basis in fact and it cannot be the product of caprice or artifice. A good-faith belief is tested by examining the surrounding circumstances which lead an employee to say that he believes he is "being required to work under conditions which are unsafe or unhealthy beyond the normal hazard." If that were not so, then an employee would have the right to refrain from performing a job simply by a bland assertion that he believes it to be unsafe or unhealthy.

In *United States Steel Corporation Heavy Products Operations (Homestead District Works) and USWA (Local 1253)* Case Nos. USS-6825-H, -6826-H, -6827-H, Grievance Nos. HHC-68-190-191-192 (August 4, 1969), (McDaniel), the arbitrator looked toward various objective factors in concluding that the grievants failed to meet the "good

faith" test. If the grievants' belief was not supported by ascertainable, objective evidence, it was not deemed to be in good faith.

Likewise, in *United States Steel Corporation Sheet and Tin Operations (Fairfield Works) and USWA (Local 1489),* Case No. USS-5322-S, Grievance No. SFE-65-32 (September 30, 1966), (McDermott), a Section 14(C) request for relief was found not to be in good faith where the employee lacked a reasonable basis for his belief that conditions were hazardous. Significantly, in that case the employee left the cab of his crane because it was too hot. But after he had been away for thirty minutes and after the temperature had been checked and found to be 80°, he refused to return. The arbitrator concluded that, even if he had been reasonable in seeking relief initially, "it is difficult to understand why grievant declined to return to the crane ... since ... he really had no basis for continuing to insist that it was still too hot in the cab ... he actually had no objective reason for questioning the Foreman's order or for declining to comply with it." The employee was accordingly held not to have asserted Section 14(C) in good faith. This case has a significant similarity to the case at bar because here, too, Semancik and Roberts may have had a valid basis initially for seeking 14(C) relief, but they had no basis ~~initially~~ for for continuing to refuse to operate the crane after management corrected what it found to be the problem which had caused Semancik to complain and provided expert assurances of the crane's safe condition. This notion is further supported by *Pyro Mining Co., Inc.,* 230 NLRB 782 (1977), where a continuing refusal to work was held unjustified, notwithstanding the fact that the initial complaint might have been protected. In the instant case, the Board presented no arbitral precedent contrary to what the company presented in connection with interpretation of the labor agreement.

There is no basis on the record to support the finding that Semancik and Roberts refused to work based upon ascertainable, objective evidence of abnormally dangerous conditions; nor did the Board offer any corroboration

of its contention that the refusal to work was "reasonable." The condition of the wheel on which Semancik and Roberts based their refusal to work was known to all responsible management and bargaining unit employees and was never considered as even a slightly hazardous condition. It was demonstrated at the time of the incident that the imperfection in the wheel was purely cosmetic. It was clear upon examination that it was a physical impossibility for the wheel to be the cause of the bumping. The actual problem was found and corrected. There were no "abnormally dangerous conditions" as required by *Gateway Coal.* The refusal to work in the face of overwhelming evidence that no abnormal danger existed was patently outside of the standards required for protection under Section 502 and the labor agreement.

This Court should look to its own pronouncement in *Whirlpool Corp. v.* Marshall, _____ U.S. _____, 63 L. Ed. 2d 154, 100 S.Ct. _____ (No. 78-1870, decided Feb. 26, 1980), wherein the Court discussed the risk taken by an employee who asserts a right to stop work due to unsafe conditions:

> (A)ny employee who acts in reliance on the regulation (permitting work stoppage due to dangerous conditions) runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith.

Thus, the company has a right to discipline an employee in the event of a work stoppage due to dangerous conditions. The company risks that such discipline might later be found insufficiently supported or excessive, but it does not risk ~~the fact~~ that such discipline was unlawful. Likewise, as the *Whirlpool* case expresses, the employee takes a risk that he might be suspended if he is later found to have acted without ascertainable, objective evidence of an abnormally dangerous condition.

When the court of appeals (in confining itself to a Section 7 analysis with which the company takes issue,

as explained above) addressed this case under Section 7, it characterized the employees' actions in refusing to work as "concerted" for the purposes of protection under the Act. The company challenges this conclusion.

As the circuit court itself noted in its opinion, footnote 14, the Third Circuit has refused to recognize the so-called *"Interboro doctrine"* of "constructive concerted activity," *NLRB v. Northern Metals Co.*, 440 F. 2d 881 (3d Cir., 1971), thus declining to hold that the Act contemplates protection of "concerted purpose." 440 F. 2d at 884. Thus, the necessary element of concert must be present in the facts of the case; the court will not supply it.[5] For an activity to be "concerted," some form of, or relationship to, group action must be involved. *Mushroom Transportation Co., Inc. v. NLRB,* 330 F. 2d 683, 685 (3d Cir., 1964) ("(B)ut to qualify as (a concerted activity), it must appear at the very least that it was engaged in with the objective of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."); *Indiana Gear Works v. NLRB,* 371 F. 2d 273, 276 (7th Cir., 1967) ("However, in order to prove a concerted activity under Section 7 ... it is necessary to demonstrate that the activity was for the purpose of

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5. The Second Circuit ruled in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf'd* 388 F. 2d 495 (2d Cir., 1967) that, even absent an interest by fellow employees, an individual employee's "attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes" and, thus, protected under the Act. 388 F. 2d at 500. A conflict has developed among the circuits regarding the doctrine. It has been expressly rejected by the Third Circuit in *Northern Metals,* cited in the text; the Fifth Circuit rejected it in *NLRB v. Buddies Supermarkets, Inc.*, 481 F. 2d 714 (5th Cir., 1972); the Sixth Circuit rejected the doctrine in *ARO, Inc. v. NLRB,* 596 F. 2d 713 (6th Cir., 1979); the Eighth, Ninth, and District of Columbia Circuits have seriously questioned it. *NLRB v. Dawson Cabinet Co., Inc.*, 566 F. 2d 1079 (8th Cir., 1977); *NLRB v. C & I Air Conditioning, Inc.*, 486 F. 2d 977 (9th Cir., 1973); *Kohls v. NLRB,* No. 79-1424 and 79-1743, _____ F. 2d _____ (D.C. Cir., decided July 18, 1980).

inducing or preparing for group action to correct a grievance or a complaint.")

Thus, where, as here, the isolated actions of individual employees are in question, the term "concerted activity" clearly requires that the employee must have acted "with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself." *NLRB v. C & I Air Conditioning, Inc.*, 486 F. 2d 977, 978 (9th Cir., 1973), quoting *Pacific Electricord Co. v. NLRB*, 361 F. 2d 310 (9th Cir., 1966); see also *Snap-On Tools Corp.*, 207 NLRB 238, 239 (1973) (single employee's complaint, unjustified under contract, was purely personal and not a concerted activity); *Northeastern Dye Works, Inc.*, 203 NLRB 1222, 1223 (1973) (individual's complaints found unprotected where he was speaking merely for himself and not for the benefit of others.)

In this case, at the time of the incident, neither Semancik nor Roberts declared any concern for the safety of other employees; nor did they attempt to or express any desire to warn other employees of an alleged danger. The court of appeals, p. 14, stated that two fellow employees accompanied Semancik when he approached the foreman regarding the wheel. However, these two employees did not testify at the trial, and there is nothing in the record to indicate that they agreed with or joined with Semancik in his efforts to get the wheel changed. The assertion that they were allied with Semancik appears for the first time in the Board's brief in the court of appeals and is unsupported by the record. This *post litem* asserted hazard to other employees is further refuted by the fact that for the crane operator to carry a load over the heads of other employees, thus directly endangering them in the event of crane malfunction, would be contrary to universally recognized procedure.

It is also significant in connection with the contention that Semancik and Roberts were engaged in concerted activity that there is no evidence that the union agent present at one point acted in concert with Semancik or Roberts. In fact, the union was not involved until *after* Semancik had stated his refusal to work and had been

suspended. Moreover, the union did not protest when another employee willingly decided to operate the crane later the same day. Neither Semancik's nor Roberts' refusal looked toward group action; they were solely for the purpose of advising as to personal interest. The refusals were, in fact, antithetical to the interest of other bargaining unit employees who were sent home early because of the work stoppage.

Recently the District of Columbia Circuit was presented with a case which dealt with facts strikingly similar to those in the instant case. In the *Kohls* case, cited in footnote 5, an employee, Kohls, refused to drive his truck, asserting that it was unsafe. Repairs were made, but Kohls still refused to drive the truck. After a hearing which was required under the collective bargaining agreement, Kohls was fired. The union filed a grievance under the contract; but Kohls withdrew the grievance and, meanwhile, filed a charge with the Board, alleging the employer, United Parcel Service ("UPS"), had violated Sections 8(a) (1) and 8(a) (3) of the Act. (The case was not brought under nor decided under Section 502.) The Board issued a complaint alleging an 8(a) (1) violation.

The ALJ found that Kohls had asserted a contractual right when he had refused to drive the truck, and that this assertion was protected concerted activity for purposes of the Act. The Board adopted the ALJ's recommendations.

When the case went before the District of Columbia circuit, the court first noted that the core of the dispute was whether Kohls' refusal to work was concerted activity for mutual aid and protection as defined by the Act. The court examined the reliance of Kohls and the Board on the *Interboro* doctrine. It expressed serious "doubts about the correctness" of the doctrine. However, it also found that the question of the soundness of *Interboro* need not be decided under the circumstances of the case, because Kohls was not engaged in protected concerted activity when he refused to perform his work. The court based its findings on the following facts of the case, which are on point with those in the case at bar:

> ... First, Kohls did not assert an interest on behalf of anyone other than himself; indeed, there is no evidence to indicate that Kohls even attempted to warn other employees not to drive the truck that he believed to be unsafe. He simply asserted that the truck was not safe enough for *him.* In *Interboro* the discharged employee was found to have been speaking on behalf of other workers.
>
> Second, although a union agent was present with Kohls during the disputed incident ... there is no evidence that Kohls and the union were acting in concert to assert a contractual claim for the protection of other employees. When another employee drove the truck later in the day, the union apparently made no effort to protest use of the truck. In *Interboro* the employees and the union worked together to correct certain alleged contract violations.
>
> Third, although the union filed a grievance under the collective bargaining agreement, Kohls later withdrew the grievance, repudiating the bargaining agent's effort to pursue a claim under the contract between UPS and IBT. Nothing in the *Interboro* opinion indicates that a grievance procedure was there available for the protection of the discharged employees. _____ F. 2d at _____.

The court then concluded regarding the issue:

> Together, these facts distinguish the present case from *Interboro* and demonstrate that Kohls' activity cannot reasonably be perceived as concerted. Since Kohls' refusal to drive the truck was not concerted activity, his discharge cannot be found to be a violation of section 8(a) (1) ... In reaching this conclusion, it is significant that Kohls was not without a remedy; he could have pursued his contractual claim, through his lawful bargaining agent, under the grievance pro-

cedures provided in the collective bargaining agreement ... Nevertheless, the main point here is that, whether or not he could have prevailed on his contract claim, Kohls was never engaged in "concerted activity" and, therefore, UPS did not violate section 8(a) (1) when it discharged Kohls for his refusal to perform assigned work.

We should note that an anomalous result would be reached if we were to enforce the Board's finding of an unfair labor practice in this case. During oral argument, counsel for the Board conceded that, absent a claim rooted in section 502 of the LMRA, (Footnote omitted) the union could not have urged its members to engage in concerted action to enforce the applicable terms of the contract between the IBT and UPS. The union's proper course of conduct would have been to file a grievance under the collective bargaining agreement.* It thus seems contradictory for the Board to argue here that an employee, acting pursuant to the same contract that binds the union, can engage in "concerted" activity that the union would be barred from taking.

*In *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802 (1961), the Board went so far as to hold that under some circumstances a strike in violation of a no-strike agreement was unprotected even though the strike was precipitated by an employer unfair labor practice. The Board found that the unfair labor practice, a discharge, was isolated and the product of a clash of personalities, and that the union had redress available for the discharge under the grievance and arbitration provisions of the collective bargaining agreement ...

(_____ F. 2d at _____; footnote is the court's.)

Finally, the court addressed the issue of the Board's

authority to resolve the contractual dispute in the first place:

> ... (I)n a case such as the instant one, which involves a contractual claim unrelated to an unfair labor practice, the Board has no authority to resolve the contractual issue. _____ F. 2d _____

In conclusion, since Kohls' refusal to work was not concerted activity under the Act, and since the Board found no other unfair labor practices and did not rely on Section 502, the Board's finding of a Section 8(a) (1) violation was rejected.

In the instant case, since Semancik and Roberts were not engaging in protected concerted activity under the Act, the circuit court should have held that the company did not violate Section 8(a) (1) when it suspended the employees. In addition, since the circuit court expressly held that the company acted without any anti-union animus (opinion, p. 20), it was inherently contradictory for the court to find a violation of Section 8(a) (1). Unless the discipline of the employees in good faith, subject to arbitration, is "inherently discriminatory" of employee rights or *per se* unlawful, there can be no violation of Section 8(a) (1). *NLRB v. Brown,* 380 U.S. 278 (1965); *American Shipbuilding Company v. NLRB,* 380 U.S. 300 (1965).

Finally, the circuit court's failure to address the back pay issue left unresolved the question of whether the refusals to work should be taken at face value. At the disciplinary hearing on September 23, 1977, Semancik and Roberts both refused to work until the spalled wheel was replaced. In fact, the wheel was not replaced until October 9, 1977, and the company was under no obligation to replace it. Thus, the stated conditions for refusal to work continued until October 9. Any computation of back pay that would be due as a result of the suspensions should not include the period prior to the replacement of the wheel, when both employees

assertedly would not have come to work. It is untenable that any award of back pay should include money for a time when a refusal to work would have admittedly been asserted.

CONCLUSION

Upon all of the foregoing, the Petitioner earnestly prays the Court for a Writ of Certiorari, directed to the United States Court of Appeals for the Third Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

DONALD L. DOTSON
Attorney for the Petitioner

APPENDIX

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UNITED STATES OF AMERICA
Before The National Labor Relations Board
Division of Judges

Case 6-CA-10586

WHEELING-PITTSBURGH STEEL CORPORATION

and

EDMOND J. SEMANCIK, *An Individual*

Nancy L. Elam, Esq., for the General Counsel.
Donald L. Dotson and *Stephen A. McCarthy, Esqs.*,
of Pittsburgh, PA, for the Respondent.

DECISION

Statement of the Case

PAUL BISGYER, Administrative Law Judge: This proceeding, with all the parties represented, was heard on February 13 through the 15th, 1978 in Pittsburgh, Pennsylvania, on the complaint of the General Counsel issued on November 28, 1977, as amended at the hearing, and the answer of Wheeling-Pittsburgh Steel Corporation, herein called the Respondent or the Company.[1] In substance, the litigated questions are whether the Respondent, in violation of Section 8(a) (1) and (3) of the National Labor Relations Act, as amended,[2] suspended employees Edmond J. Semancik and Francis Roberts for engaging in protected union and other concerted activities in relying on a claimed contractual right to be relieved of an assigned job which they asserted to be unsafe and hazardous and whether two supervisors made coercive statements to two employees which were independently violative of Section 8 (a) (1) of the Act. At the close of the hearing, the parties waived oral argument. Subsequently, counsel for the General Counsel submitted a brief in support of her position, while the Respondent's attorneys filed a brief supplementing the one they had previously submitted at the trial.

Upon the entire record, and from my observation of the demeanor of the witnesses, and with due consideration being given to the arguments advanced by the parties, I make the following:

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1. The complaint is based on a charge filed by Edmond J. Semancik on September 21, 1977, a copy of which was duly served on the Respondent by registered mail on the same date.

2. Section 8(a) (1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Insofar as pertinent, Section 7 provides that "(e)mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain

Findings and Conclusions

1. The Business of the Respondent

The Respondent, a Delaware corporation with its principal office located in Pittsburgh, Pennsylvania, and facilities located in that State and West Virginia, is engaged in the business of the manufacture and non-retail sale of steel products. The Allenport, Pennsylvania, plant is the only facility involved in this proceeding. During the 12-month period immediately preceding the issuance of the complaint, the Respondent shipped goods valued in excess of $50,000 from its West Virginia facility directly to points outside West Virginia. During the same period, the Respondent shipped goods valued in excess of $50,000 from its Pennsylvania plants to points located outside that State.

It is admitted, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organizations Involved

It is conceded, and I find, that the United Steelworkers of America, and its Local No. 1187, AFL-CIO-CLC, herein jointly called the Union, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

NOTE 2 — *(Continued)*

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...."

Section 8(a) (3), with certain qualifications not material herein, prohibits an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...."

A. Introduction; Issues

The Allenport, Pennsylvania, facility, which employs some 2,600 employees, performs finishing work on tubular and sheet products received from the Respondent's nearby Monessen plant. This case arises out of the Respondent's suspension of two employees, Edmond J. Semancik and Francis Roberts, because of their refusal to operate the electric overhead travelling crane in the No. 5 Building of Allenport's Tube Department. The crane services the production floor. Semancik, as the regular operator of this crane, and Roberts, as his subsequently assigned replacement, requested to be relieved of this job because they believed that the crane was not safe to operate due to a hole or "spall"[3] in one of its idler wheels. They asserted this right under Section 14(C) of the current collective-bargaining agreement between the Respondent and the Union,[4] the employees' bargaining representative, which provides in relevant part:

> An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall have the right to:
>
> 1. File a grievance in the Second Step of the complaint and grievance procedure for preferred handling in such procedure and arbitration; and/or

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3. In its brief, the Respondent defines a "spall" as a "shallow cavity left when metal flakes from the surface of a (welded) wheel." The term hole or spall will be used interchangeably in this Decision.

4. The collective-bargaining agreement is actually between the Respondent and the United Steelworkers of America and covers bargaining unit employees at the Respondent's Monessen and Allenport, Pennsylvania, plants, for a term from August 1, 1977 to August 1, 1980.

2. Relief from the job or jobs, without loss to their right to return to such job or jobs, and, at Management's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job, provided he first reports the matter to his committeeman or foreman. Should either the Management or the Arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the Employee not have been assigned to other available, equal or higher-rated work, he shall be paid for the earnings he otherwise would have received.

* * *

It appears that this provision has been included in substantially the same language in the United Steelworkers' contracts with major steel companies since 1947 and, in particular, in its contracts with the Respondent since the latter's formation in 1969 as a result of the merger of the Wheeling Steel and Pittsburgh Steel companies. It is alleged that the suspensions violated Section 8(a)(1) and (3) of the Act because they were imposed as punishment for engaging in protected union and other concerted activity in relying on their asserted contract right. The Respondent, on the other hand, justifies the suspensions on the ground that Semancik and Roberts refused to perform their duties and the claimed contractual right to relief from their assignments was not available to them because they did not invoke it in good faith or in the reasonable belief that the crane was unsafe to operate in view of the fact that the Respondent's supervisory staff advised them of their expert opinion that the wheel in question did not create a dangerous condition. Also to be determined is whether the remarks of General Foremen Miles and Michaels to two employees amounted to unlawful threats of more severe discipline

to be meted out to employees for adhering to, and defending their assertion of contractual rights at a disciplinary hearing. We turn to the evidence.

B. *The Evidence*

1. Semancik's refusal to operate a crane asserted to be unsafe; his reliance on a claimed contractual right; and his suspension

Semancik has been employed by the Respondent as a craneman for about 5 years, the last 3 years of which being regularly assigned to operate the 7½ ton electric overhead travelling crane in the No. 5 Building of the Tube Department.[5] This crane rides on rails the 700 foot length of the building about 30 feet above the production floor where some 35 employees work on each shift. Semancik's duties consist of moving pipe and other materials to and from different areas on the production floor and loading and unloading railroad cars, as directed by a production foreman or hookers.[6] He works under the supervision of both the electric shop and the production department. There is no question that Semancik is a competent craneman who, until the events to be presently related, never refused to perform his job or requested to be relieved under the safety and health provision of the collective-bargaining agreement recited above, although he has called supervisory attention to minor safety problems whenever they occurred, as he is undoubtedly expected to do.

On the morning of September 19, 1977,[7] while operating

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5. One craneman is assigned on each of the three shifts on a rotational basis to run the No. 5 Building crane. The Respondent operates many other cranes throughout its Allenport operations.

6. Hookers are employees who attach cables from hoist mechanism on the crane around the load of pipe to be moved by the crane.

7. All dates, unless otherwise indicated, relate to 1977.

his crane to move loads on the production floor, Semancik detected that the crane was riding rougher than usual, bumping, thumping and sliding along the rails. Consequently, at about 9:30 a.m., he stopped the crane to investigate what was wrong and discovered a hole in an idler wheel, whose size he estimated to be approximately 3½ inches to 4 inches long, about 2 to 2½ inches wide and about one-half inch deep.[8] Semancik testified that this was the first time he had ever been aware of a hole in this wheel, although it appears that this wheel had previously been removed from the crane because of this condition but was subsequently reinstalled before the September 19 events.[9] It was Semancik's asserted belief that this hole caused the crane and wheel to thump, especially when the hole came in contact with the rail joints, and that this condition, in turn, could cause the load, which was being carried or hoisted, to sway and likely to fall. For this reason, Semancik testified, he concluded that it would be too dangerous to himself and the employees on the production floor to continue to operate the crane in that unsafe condition.[10] He, thereupon, reported the situation to Production Turn Foreman Garmon W. Longnecker, who, at Semancik's request, called the electric shop for a crane repairman.

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8. There is a slight variation in the size of the hole as estimated by several witnesses which does not affect my ultimate determination.

9. As will later be discussed, a notation in the Respondent's crane repair log book for May 18, shows that the wheel in question had a "hole" in it. It also appears that this wheel was replaced by a new one on June 5 at the same time when the crane was down on a weekend in order to change a bridge armature in the motor; that the wheel with the hole, which was kept as a spare, was again installed on July 31 in place of the new wheel which was removed because of a broken axle; and that on October 9 after the September 19 events, the spalled wheel was again replaced with a new carbonized wheel.

10. On prior occasions, Semancik had dropped loads because of improper operation of the crane or other reasons.

Shortly thereafter, Crane Repairman Joe Gardner arrived. Upon being informed by Semancik of the hole in the wheel, both went on the bridge and visually inspected the wheel. In answer to Gardner's inquiry whether he wanted the wheel changed, Semancik replied in the affirmative since, in his opinion, the hole could only become larger and worsen if the wheel remained in use on the crane. In the course of the inspection, Semancik also pointed out a circular area on the outer side of the flange of the wheel which appeared to him to be a crack. Gardner, however, indicated that, although he was not sure what it was, he did not think it was bad. Gardner then stated that he was leaving to report the situation to his supervisor, Charles Michaels, the General Foreman of Shop Services, Electric Department, and to obtain the equipment needed to change the wheel. At some point while Gardner and Semancik were still on the bridge of the crane, Turn Foreman Longnecker joined them to view the problem and then returned to his office.

Upon Gardner's departure, Semancik appraised Longnecker that the wheel was going to be changed.[11] A few minutes later, Gardner returned to Semancik and advised him that the wheel would not be changed and that General Foreman Michaels wanted him to run the crane as it was. Semancik responded that perhaps Gardner did not adequately explain the problem to Michaels and that it might be advisable that he (Semancik) personally discuss the hole in the wheel with Michaels and inform him how badly the crane was operating. With Gardner in agreement that this might be a good idea, Semancik,

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11. According to Longnecker, Gardner informed him at about this time that he (Gardner) had told Semancik that the wheel was safe but that he also had told Semancik that he, nevertheless, would change it if Semancik wanted him to. While I believe the latter statement, I seriously doubt that Gardner stated that the wheel was safe. The latter remark is not indicated in Semancik's uncontradicted and credited account of his conversation with Gardner upon which I base my above findings. Gardner, who was still in the Respondent's employ at the time of the hearing in this case, was not called as a witness.

Gardner, and two hookers went to Michaels' office.[12] On the way, Turn Foreman Longnecker, manifestly concerned with the resultant interruption of production, called Semancik over to him and ordered Semancik to run the crane or leave the plant, declaring that he was the boss of No. 5 Building and not the electric shop supervisors or the crane repairman. When Semancik insisted that he still thought that he should see General Foreman Michaels, Longnecker agreed. Semancik and the other employees thereupon proceeded to Michaels' office. Upon their arrival, Michaels, who was about to leave his office, asked Semancik what he wanted. Semancik, in the presence of Crane Repair Foreman Roland Basile and Semancik's accompanying employees, inquired whether the wheel on his crane was going to be changed. Michaels responded by expressing disapproval of Semancik's action in not operating the crane and in shutting down the No. 5 Building production department and directed him to return to the crane or go home, adding that when he (Michaels) had time he would send someone up to the crane to check on the wheel. Semancik, thereupon, declared that he was invoking his Section 14(C) contractual right to be relieved of his job. Whether or not Michaels expressly told Semancik on this occasion that the wheel was safe, it is reasonable to assume that Michaels, at least, believed that the crane could be safely operated with the hole or spall in the wheel, although

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12. I do not credit Michaels' testimony that Gardner had previously reported to him that the wheel wasn't creating a problem and was not pounding or thumping. It is clear that Gardner did not operate the crane when he inspected the wheel the first time. Moreover, as indicated above, Gardner tacitly agreed with Semancik's suggestion that he (Semancik) ought to discuss the problem of the hole in the wheel and the poor operation of the crane with Michaels and, indeed, Gardner accompanied Semancik to see Michaels. Thus, it is not likely that Gardner would advise Michaels that the wheel did not present a safety problem. It is also noted that Michaels further testified that he would have changed the wheel if it had "pounded" but yet he did not ask Gardner if he had operated the crane.

admittedly he had not yet visited the crane that morning to examine the defect.[13]

Following this episode with Michaels, Semancik unsuccessfully tried to locate Union Grievance Committeeman Thomas Litavec and Union Safety Representative Gaudio in the plant to discuss the matter with them. While heading for a telephone to call Local Union President Harry Reis, Semancik met Kenneth Miles, the general foreman in the production department, and informed him of the developing situation and his assertion of his Section 14(C) contractual right to be releived of his job he regarded to be unsafe. Miles commented that his complaint concerning the crane was being investigated by management. Shortly thereafter, Semancik joined Crane Repair Foreman Basile and Crane Repairman Gardner, whom Michaels had dispatched to inspect the wheel and the crane's operation, and all three boarded the crane. With Semancik operating the crane from the cab, Basile and Gardner stood on the bridge observing the spalled wheel as the crane moved up and down the rails. Upon the completion of this procedure, Basile approached Semancik and asked what the hell did he say to Michaels to get him so mad. Semancik answered that Basile ought to know since he was present in the office at that time. Basile, however, denied hearing anything. Turning to the subject of the crane, Basile then asked Semancik what was his problem. Semancik responded, in effect, that the hole in the wheel created an unsafe condition and that the crane was making a thumping noise. In reply, Basile stated that from his examination of the wheel he could find nothing dangerous in the wheel or in the operation

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13. Longnecker testified that, when Semancik told him earlier that the wheel was going to be changed, it brought to mind that this was the wheel which had once been removed from the crane but was later reinstalled; that, for this reason, he conferred with General Foreman Michaels to ascertain whether the wheel was safe; and that, although Michaels stated he knew all about the wheel and it was safe, he (Longnecker) suggested that Michaels come over to the crane to inspect it.

of the crane.[14] Basile, however, added that he did notice that the rails were slippery due to moisture settling on them and that therefore they needed sanding. Evidently in disagreement with Basile concerning the safe condition of the wheel and crane, Semancik commented that he had already asserted to Michaels his right to relief from his job under Section 14(C) of the contract. The conversation ended with Basile stating that he was returning to his office to report his findings to Michaels.[15]

Semancik, Basile and Gardner then descended to the production floor. While Gardner proceeded to another building to obtain sand to place on the rails and Basile to report to General Foreman Michaels, Semancik engaged Longnecker in conversation in the course of which Longnecker evidently urged Semancik to run the crane, which Semancik declined to do. When Longnecker responded that Semancik was suspended, Semancik again invoked his asserted contractual Section 14(C) right. Semancik thereupon entered the office and called Local Union President Reis and apprised him of the foregoing happenings and his assertion of his Section 14(C) right, and suggested that he come to the plant because matters were getting a little out of hand. Reis indicated that he would be there shortly. At this time, Semancik also repeated his reliance on Section 14(C) for relief from the job to General Foreman Miles, who apparently was in the office.

In the meantime, before reporting to Michaels, Basile had the occasion to speak to Miles and Longnecker about his inspection of the crane, informing them that, although the wheel had a spall, it created no safety problems but that the rails were slippery and needed sanding — a job

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14. Gardner also mentioned a ridge on the wheel which he told Basile was previously pointed out to him by Semancik who thought it was a crack. Basile assured Gardner that it was not.

15. The foregoing narration is based on parts of Semancik's and Basile's testimony which appear to me substantially to reflect what probably occurred during the inspection. In any event, acceptance of either witness' version will not affect my ultimate determination.

he was preparing to do. When Basile subsequently reached Michaels' office, he conveyed the same report to him.

Upon Gardner's return to the crane with the needed sand, he, Basile and another employee proceeded to sand the rails, while Electrical Turn Foreman Daniel Wineland, who, as later discussed, had come upon the scene with a craneman replacement, operated the crane in the sanding process.[16] Wineland, who similarly viewed the problem as one requiring sanding to remedy it, noticed that the crane was also out of alignment which could cause bumping, thumping and other noises. He, thereupon, took steps to realign the crane, which is a few-minute routine procedure familiar to all experienced cranemen.[17]

It was not long before higher management officials became involved in the shutting down of the crane and the consequent interruption of the production operations which had come to a halt about 10 or 10:30 a.m. Since there was no prospect of an early resumption, the production employees were sent home several hours before their shift ended. At the request of Thomas Gilchrist, the General Superintendent of the Tube Division, Michael A. Carroll, the Superintendent of Electrical Maintenance, visited the crane to check out the hole or the spall in the idler wheel in question and to determine whether this condition made it unsafe to operate the crane. When Carroll arrived there, the sanding job and the alignment

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16. It is unnecessary to the ultimate disposition of the case to resolve a conflict in testimony whether Semancik refused to assist in the operation of the crane in the sanding process.

17. Semancik, in effect, denied that he caused the crane to be out of alignment. Rather, he testified, contrary to Basile's testimony, that it was Basile who probably caused it when Basile experienced difficulties in operating the crane. Without determining who was responsible for the misalignment, it is clear to me that that was not the condition of the crane when Semancik operated it. If it were, Semancik, admittedly an able craneman, would have undoubtedly remedied that situation very easily and would not have been otherwise concerned over the operation of the crane.

of the crane were completed. Basile informed Carroll that there was nothing wrong with the wheel, as Carroll had also previously been told by Michaels, although there had been a spall on the tread for some time. From his own observation of the wheel and the operation of the crane, Carroll concluded that the spalled area did not come in contact with the rails[18] and that there was no bumping or thumping experienced as the crane rode back and forth on the rails.[19] He then returned to the production floor where he advised General Foreman Miles and Robert England, Superintendent of the Tube Finishing Floors, that the wheel was safe and did not need to be changed immediately but that a change could be scheduled for the "normal downturn" which was due to take place the next weekend or so.[20] Caroll further stated that meanwhile it was safe to operate the crane.

Without further detailing other managerial and super-

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18. Harry A. Dudro, formerly Superintendent of Safety and Plant Protection at the Allenport plant, confirmed Carroll that from his observation, the spalled area of the wheel did not touch the rails. However, he conceded that eventually the spalled area would come in contact with the rails as the wheel becomes sufficiently worn. According to the testimony of General Superintendent Gilchrist, the wheel was safe until the spalled area "becomes larger than the bulb of the rail. At that point, there will definitely be a thumping ... and (the wheel) should be changed. It's not good maintenance to let it go to that extent, but that's the point in time at which it would become a hazard." Electric Department General Foreman Michaels also admitted that once a spall exists on a welded wheel it "will get progressively worse." Carroll similarly testified that once spalling begins it could lead to serious operative problems.

19. According to Carroll, thumping and bumping could be caused by the crane being out of alignment.

20. At the hearing, Carroll explained that, based on past experience, spalls develop on welded wheels, which the wheel in question was, and that stress would have to be applied to a wheel to cause a piece of metal to come off. The spall here involved was the result of metal flaking.

visory consideration given to the crane and wheel problem, it is sufficient to note that they conferred among themselves and unanimously reached the conclusion that the hole or spall in the wheel did not create an unsafe or dangerous condition in the operation of the crane. Moreover, they were of the opinion that Semancik, as well as Roberts whose contractual claim for relief as an assigned replacement will be later discussed, acted without a reasonable basis for his belief that the wheel was dangerous and impaired the safe operation of the crane.

In this connection, it is worthy to note that prior to the September 19 events, management was aware that the idler wheel had the same spalled area. A crane inspection report dated 5-18-77 states "opp. idler wheel has hole in it on rail face? (sic)", although item 29 of the report entitled "Bridge Wheels" is checked to indicate that the wheels were found to be in good condition. The spalled wheel was replaced with a new wheel on June 5 when the crane was down to change a bridge armature in the motor. The Respondent considered this an opportune time to make the wheel change, even though the wheel was not causing an immediate difficulty. However, the spalled wheel was reinstalled on July 31 when the previously installed new wheel sustained a broken axle. The spalled wheel was the only spare replacement available at that time and remained on the crane until October 9, when a new carbonized wheel was put on and the Respondent discontinued the use of welded wheels, which the previous ones were. As will later be discussed, the wheel change was made following an OSHA (Office of Safety and Health Administration) inspection and the issuance of a citation.

2. The suspension of Semancik and Roberts; the resumption of the crane operation

Notwithstanding management's insistence that its investigation of the hole or spall in the wheel failed to disclose a hazardous condition for the operation of the

crane, Semancik adhered to his contrary belief, declining management's overtures and the opportunity afforded him to run the crane and thus restore the production operations. Instead, he repeatedly invoked his claimed Section 14(C) contractual right to be relieved of his job which he insisted was unsafe. As a result, General Foreman Miles suspended Semancik and directed Turn Foreman Longnecker to communicate with Electric Turn Foreman Wineland to secure a replacement for Semancik to operate the crane. Wineland thereupon assigned Francis Roberts as the replacement.[21] At about this time, Union President Reis arrived at the scene where he discussed the problem and Semancik's suspension with Semancik and Longnecker.[22] Upon being advised by Longnecker that he had sent for a replacement Reis advised Semancik that he had a contractual right to remain in the plant to inform the replacement concerning the crane problem and the reason for Semancik's action and request for relief.[23] Reis however, also cautioned Semancik that the replacement had the right to determine for himself whether or not to operate the crane and that Semancik must not interfere with that right.

When Roberts came to the No. 5 Building, Reis and

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21. Wineland, however, also brought over to the No. 5 Building employee Russell, a recently hired craneman, who had not operated a crane for a long time and was then being reinstructed in such a job. Although Miles or Longnecker asked Russell to undertake the operation of the crane, Russell refused, also invoking his Section 14(C) contractual right. Nevertheless, he was not suspended when Wineland informed Miles or Longnecker that Russell was not yet qualified to run the No. 5 Building crane.

22. Following this conversation, Reis discussed the situation in Miles' office with Miles, Basile and Wineland. In answer to Reis' inquiry why the wheel would not be changed, Wineland stated that another one was not available. However, these supervisors also expressed their opinion that the wheel was safe.

23. Section 14(C), in granting an employee relief from the job, specifically provides that "no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job ...."

Semancik explained the situation to him. Reis impressed upon Roberts that the decision whether to operate the crane was his (Roberts), while Semancik informed him about the hole in the wheel, which he pointed out from the production floor below the crane where they were standing, and that he had asked for relief from the job because of this unsafe condition. Observing the hole which was outlined by the sand from the rails which clung to the wheel, Roberts concluded that the hole in the wheel made it too dangerous to operate the crane because the ride could become bumpy and cause a hoisted load of pipe to drop. For this reason, Roberts, who never before had the occasion to invoke Section 14(C), also asserted his claimed contractual right and asked Longnecker that he be releived of the assignment. Superintendent England, who was present on this occasion, then urged Roberts to run the crane which he assured him was safe to do but Roberts, nevertheless, persisted in his belief that the crane was not safe to operate. Because of England's continued efforts to induce Roberts to change his mind, Reis interceded to advise Roberts that he was not obligated to say any more. England thereupon informed Roberts that he was suspended, as did Miles subsequently.

Following their suspension, Semancik and Roberts discussed developments up to that time with Grievance Committeeman Thomas Litavec, who had arrived in the meantime. At Litavec's suggestion, Semancik and Roberts left the plant a little before 1 p.m., while Litavec remained on the production floor to await the appearance of another replacement.

After Semancik's and Roberts' departure, management officials and supervisors conferred in Miles' office where they reviewed the events and decided to impose a 5-day suspension period on them, which is the maximum the bargaining contract allowed before a hearing is held.[24]

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24. Section 8(B) of the contract provides, in pertinent part:
An employee shall not be peremptorily discharged. In all cases in which Management may conclude that an employee's conduct may

Miles later in the afternoon telephoned Semancik and Roberts at their homes and notified them of their 5-day suspension and that a hearing on it would be held in a few days. A formal written suspension notice was subsequently issued by Miles to each of them on September 20, stating that they were suspended for a period of 5 days from September 20 to 24 on account of their "(r)efusal to work as directed" on September 19. Litavec also received both the oral and written notification of suspension.

While Turn Foreman Wineland was attempting to locate another craneman on September 19, management requested

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NOTE 24 — *(Continued)*

justify suspension or discharge, he shall be promptly suspended initially for not more than 5 calendar days, such notice of suspension to be in writing. In all cases of discharge, or of suspension for any period of time, a copy of the discharge or suspension notice shall be promptly given to the employee's grievance committeeman and a copy to the President of the Local Union.

* * *

If such initial suspension is for 5 calendar days and the employee affected believes that he has been unjustly dealt with, he or a committeeman may request and shall be granted, during this period, a hearing and a statement of the offense before a representative (status of department head or higher) designated by the Works Manager of the plant with a grievance committeeman present. At such hearing all the then known facts concerning the case shall be made available to both parties. After such hearing or if no such hearing is requested, Management may conclude whether the suspension shall be affirmed, modified, extended, revoked, or converted into a discharge. In the event the suspension is affirmed, modified, extended or converted into a discharge, the employee may within 5 calendar days after notice of such action, file a grievance in the Second Step of the complaint and grievance procedure. Final decision shall be made by the Company in this step within 5 calendar days from the date of the filing thereof. Such grievance shall thereupon be handled in accordance with the procedures of Section 6 — Adjustment of Complaints and Grievances, Section 7 — Arbitration, and Appendix J — Grievance and Arbitration.

the cooperation of Reis and Litavec to restore operations in the No. 5 Building. Finally, Wineland succeeded in contacting Craneman Banes at his home. When Banes arrived, he was informed by Litavec of the suspension of Semancik and Roberts for refusing to operate the crane because they viewed the hole in the wheel in question to be unsafe. Alluding to the need for the resumption of production, General Superintendent Gilchrist, in turn, requested Banes to run the crane, assuring him that no hazard was involved in retaining the spalled wheel on the crane. At Litavec's suggestion that Banes view the wheel himself and make his own decision, both of them boarded the crane. After examining the wheel and then operating the crane,[25] Banes descended to the production floor and expressed his willingness to Gilchrist and other management officials to run the crane at a slow rate of speed but on the condition that he would not be held responsible should anything happen because of the wheel. This condition was acceptable to management. The crane was safely operated that day and the department resumed normal production.

3. The suspension hearings; the additional discipline imposed on Semancik and Roberts; the complaint made to OSHA; and the removal of the spalled wheel

Pursuant to the collective-bargaining agreement, separate disciplinary hearings were held in the morning of

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25. While waiting for Banes to descend from the crane, Litavec was asked by Safety Superintendent Dudro whether he was aware that Semancik had once filed a complaint with OSHA concerning coke fires made to heat the production area in the No. 5 Building. Litavec answered in the negative since the complainant's name did not appear on the OSHA document. In response, Dudro stated that he had assigned people to ascertain the identity of the person whose telephone number appeared on the complaint, instead of the Company's, and it turned out to be Semancik's.

September 23 respecting the suspension of Semancik and Roberts. However, before the opening of these hearings, management representatives consisting of Superintendent of Industrial Relations Robert Farr, Gilchrist, England, Carroll, Dudro, Miles, Michaels, Basile, Wineland and Longnecker met in private conference in Farr's office. There, Farr instructed the group in the procedures to follow at the hearings and discussions ensued regarding the seriousness of the shutdown of operations and the discipline options available to the Company ranging from the 5-day imposed suspension to a longer one or even discharge. During this meeting, General Superintendent Gilchrist voiced the hope that Semancik "has cooled down and decided that he was wrong and we can let ... (the suspension) stand at five days ... (and that) we don't have to carry anything like this further." Miles stated that he did not expect Semancik to change his position, while Longnecker remarked that he doubted Semancik would change his mind because "(o)ne day he is cooperative and the next day he is stubborn."[26]

Immediately after this private management meeting, Semancik's disciplinary hearing, presided over by Farr, was opened. The same individuals present at the private meeting represented management, while Lou Vitalbo, as the acting union president, and Committeeman Litavec, represented Semancik who was also in attendance. The Union justified Semancik's conduct based on his Section 14(C) contractual right and his belief that the wheel created an unsafe condition and requested his reinstatement with lost pay. The Respondent, on the other hand, challenged the assertion of this right on the grounds that

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26. Dudro also mentioned at this meeting that Semancik had once complained to OSHA about open coke fires which were used on the production floor to keep employees warm. Semancik's objection was that the fumes from the fires made him uncomfortable while operating his crane overhead. It appears that the OSHA complaint was filed in February or March 1977. Farr explained to Dudro that the OSHA complaint had no bearing on the matter to be considered that morning.

no hazardous conditions existed; that it was unreasonable for Semancik not to accept management's opinion and assurance that the crane was safe to operate; and that the interruption of production was inexcusable. This led to a heated verbal exchange between Semancik and Farr in which Farr stressed the seriousness of the offense of causing a production shutdown, while Semancik denied shutting down operations but defended his belief that there was an unremedied safety problem presented which justified exercising his right to be relieved of his job under Section 14(C) of the contract after calling management's attention to this condition. Semancik also justified his contractual right to convey this information to Roberts, who was assigned to replace him. According to Superintendent England, another management representative at some point during the hearing inquired of Semancik, if the same problem arose again and he was told by "everybody" that the crane was safe, would he run it. Semancik gave a negative response. The hearing closed with Semancik being advised that he would be notified of the Company's decision later.

Then followed Roberts' hearing attended by the same management and union representatives with Roberts being present instead of Semancik. The same general discussions ensued but in calmer tones. Roberts defended his belief that the wheel was unsafe and his right to invoke the Section 14(C) privilege to be relieved of his No. 5 Building crane assignment, even though England and Longnecker had assured him that the crane was safe to operate. When Farr asked Roberts whether he was willing to admit that he was wrong in his action, Roberts gave a negative answer. Management, of course, repeated its position previously advanced in the Semancik hearing.

At the conclusion of the hearings, management representatives again conferred in private; reviewed the events; conducted a poll among the participants concerning the discipline to be meted out to Semancik and Roberts; and decided to extend the initial 5-day suspension another 30 days. In these discussions, a consensus of opinion

was expressed to the effect that such punishment was required because Semancik and Roberts acted in bad faith and were unreasonable and inflexible in their refusal to accept management's expert and informed judgment that the hole or spall in the wheel did not impair the safe operation of the crane but, instead, adamantly relied upon Section 14(C) of the contract to cause a disruption of production and, in addition, showed no disposition to acknowledge their error and avoid a repetition of their offense in the future. Moreover, there is testimony by management witnesses disavowing that the additional 30-day suspension was prompted by Semancik's or Roberts' conduct in expressing their views in defense of their position or because an OSHA complaint concerning the spalled wheel had been filed, which will presently be discussed.

Later in the afternoon, General Foreman Miles advised Semancik and Roberts by telephone that they were given an additional 30-day suspension. This was confirmed by certified mail sent out the same day that their suspension was extended through October 29. The Union was furnished with similar verbal and written notice. Subsequently, a grievance on behalf of Semancik and Roberts was filed which was pending at the time of the hearing in the instant proceeding. Previously, on September 21, an unfair labor practice charge in this case was filed by Semancik.

About September 25 or 26, Grievance Committeeman Litavec received a telephone call at home from Miles, apprising him of the additional 30-day suspension given to Semancik and Roberts. Litavec testified that Miles then volunteered the statement that, had Semancik kept his mouth shut at the hearing and not gotten involved in an argument, "it would have gone a lot better and ... they would possibly have gone with the 5-day suspension and let them come back to work." Litavec further testified that, in response, he made the comment that he regretted not arriving at the scene sooner and possibly preventing the situation from reaching the point it did. According to Miles' version of this conversation, he told

Litavec that if Semancik had taken a reasonable position, this would not have happened. Litavec impressed me as a reliable witness not inclined to fabricate testimony and upon whose recollection one could confidently rely. I, accordingly, credit his testimony.

On or about October 30, Semancik and Roberts returned to work. While at work during the second week of his return, Roberts had a conversation with General Foreman Michaels. Roberts testified that, when he remarked to Michaels that he and Semancik did not deserve the additional 30-day suspension, Michaels answered that, if Semancik had kept his mouth shut at his hearing, the additional discipline would not have been imposed. Michaels testified that he could only recall remarking that "we" had gotten into "a hell of a mess" and that Roberts was "either a victim of bad judgment or bad leadership or words to that effect" and that Roberts added, "not doing what you're told." Here, too, I find Roberts' version more convincing and credit it.

OSHA also became involved in the spalled wheel problem. On September 19, following the initial suspension of Semancik and Roberts, Union President Reis telephoned OSHA and reported what he considered to be a safety hazard created by the wheel in the operation of the crane in the No. 5 Building. At the request of the OSHA agent, Semancik and Roberts called the agent and furnished him with the information regarding the wheel. On or about September 21, the OSHA agent visited the No. 5 Building where he inspected the crane and the wheel and advised General Foreman Michaels, who accompanied him on the inspection, that he would not shut down the crane as he needed more time to check on the effect of a spalled wheel on the operation of the crane. However, OSHA subsequently issued a citation requiring the Respondent to remedy the situation by November 7. Before that date, on October 9, the Respondent removed the spalled wheel from the crane and replaced it with a new carbonized wheel. A day before the scheduled hearing on the OSHA citation, the Respondent was informed that the citation was withdrawn.

Michaels testified that, after the spalled wheel's removal, the Respondent submitted it to a laboratory to test whether it contained "hairline cracks" not visible to the eye and that the test revealed there were none.

C. *Analysis; Concluding Findings*

With respect to the suspensions

It is well established that an employee engages in protected concerted activity when he undertakes to exercise a right provided for in a collective-bargaining agreement between the employees' exclusive bargaining agent and their employer.[27] Unquestionably, this applies to a contractual right involving safe and healthy conditions of employment.[28] For, as the Board observed in *Roadway Express:*[29]

> ...when an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act . . . .

To discharge or otherwise discipline an employee for

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27. *Bunney Bros. Construction Company,* 139 NLRB 1516, 1519; *Cray-Burke Company,* 208 NLRB 708, 711.

28. *Roadway Express, Inc.,* 217 NLRB 278, 279, enfd. 532 F. 2d 751 (C.A. 4); *T & T Industries, Inc.,* 235 NLRB No. 73, JD 6.

29. *Roadway Express, supra,* 279. Indeed, even in the absence of a contractual provision, an employee acting alone in protesting lack of safety precautions in a plant, may, under certain circumstances, be engaging in concerted activities guaranteed by Section 7 of the Act with respect to a matter of "continuing concern for all within the work force." *Alleluia Cushion Co., Inc.,* 221 NLRB 999, 1000; *Pink Moody, Inc.,* 237 NLRB No. 7; see also *P & L Cedar Products,* 224 NLRB 244.

asserting such a contractual right therefore interfers with, restrains and coerces employees in the exercise of their Section 7 rights in violation of Section 8(a) (1) of the Act, and constitutes, as well, discrimination which discourages employees from relying on the fruits of a collective-bargaining contract secured for them by their bargaining agent in violation of Section 8(a) (3).

Guided by the foregoing principles, it appears that Semancik's invocation of Section 14(C) of the contract to be relieved of his job after being ordered by the Respondent to operate the crane because he believed that the hole or spall in the idler wheel created an unsafe and dangerous condition for the operation of the crane was a protected union and concerted activity for which it was unlawful to discipline him. As quoted above, Section 14(C) explicitly grants "(a)n employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question" the option of filing a grievance or of asserting "the right to ... (r)elief from the job ... without loss to their right to return to such job ...." It is thus clear that Semancik was entitled to be excused from running the crane, without being disciplined for failing to perform his duties, unless there is merit in the Respondent's contention that the Section 14(C) right was not available to him.

The Respondent argues that Section 14(C) requires that the employee act in good faith and reasonably which, under the facts of the present case, meant that he was obliged to accept the expert judgment of management officials and supervisors that the crane was safe to operate, despite the hole or spall in the wheel. I agree with the Respondent's position only insofar as the right to relief must be asserted in good faith. Otherwise, the manifest purpose of Section 14(C) to guarantee to employees the right to be excused from working under conditions believed to be beyond the normal hazards of their job would be subverted. In other words, it is not too much to require that the employee *honestly* and

genuinely believe that the complained of working condition is "unsafe or unhealthy beyond the normal hazard inherent in the operation in question," and that the claim to relief not be used for ulterior motives or as a pretext to achieve objectives unrelated to safety.[30] Here, the record is devoid of any evidence to impugn the sincerity of Semancik's motivation and concern over safety in requesting to be relieved of operating the crane with the spalled wheel he wanted changed. However, I cannot subscribe to the Respondent's view that Semancik, as well as Roberts later to be considered, forfeited this right to relief when he allegedly acted unreasonably in refusing to accept the Respondent's expert opinion and assurance that the crane was safe to operate.[31] It is not an extraordinary occurrence for an employee to have a sincerely-held belief or conviction that a working condition is unsafe and beyond the normal hazard of his job, even though his employer might come to a different conclusion. I find nothing in the language of Section 14(C) which requires an employee to relinquish his contractual option to be relieved of a job he honestly believes is unsafe simply because his employer thinks the job presents no abnormal dangers. Any other interpretation of the clause would nullify the employee option which, as the clause plainly indicates, is effective until the underlying safety dispute could be expeditiously resolved under the grievance-arbitration procedure. It is noted that, under Section 14(C), the employee is not entitled to be paid unless the Respondent, in its discretion, assigns him to other work or "Management or the Arbitrator conclude(s)

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30. Several arbitration awards cited by the Respondent in support of its position dealt with precisely such a situation.

31. In its brief, the Respondent relies on the Arbitrator's concept of "good faith" as analyzed in his Opinion and Award in *Crucible, Inc., Midland Division* and *United Steelworkers of America, Local Union No. 1212,* Decision CK-8 (1974). It is sufficient to note that that case did not concern the interpretation of any contract clause, as is here involved.

that an unsafe condition within the meaning of this Section existed ...."

Equally untenable is the Respondent's argument that to sanction employees' right to relief under Section 14(C), in disregard of management's claimed expert opinion concerning the safety of the crane operation, would only lead to intolerable results and serve to undermine its managerial authority. The short answer is that, whatever effect Section 14(C) might have on management's authority, it is a provision embodied in a collective-bargaining contract voluntarily agreed to by the Respondent. It is settled law that it is not within the province of the Board to rewrite a party's contract. It follows that the Respondent cannot justifiably object if employees exercise — and, in particular, if Semancik and Roberts exercised — that right to relief conceded to them in the contract and that, by suspending or otherwise disciplining employees for invoking that right, imposes an unlawful restraint upon their statutorily guaranteed concerted activity.

Assuming that Section 14(C) is interpreted to permit its exercise only if the employee has reasonable grounds to believe that a working condition was unsafe "beyond the normal hazard inherent" in the job, I find that the record in the present case amply supports Semancik's belief that the operation of the crane was unsafe, despite the Respondent's contrary opinion. Thus, Semancik, an admittedly experienced and competent craneman, who had operated the crane in question regularly for 3 years and who had never before September 19 requested relief, discovered a hole or spall in the crane wheel on that date when he inspected the crane which was bumping and sliding along the rails. Concerned that such rough operation of the crane could cause loads of pipe being hoisted and carried to drop and result in injury to himself and employees on the production floor[32] and damage to

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32. Contrary to the Respondent's suggestion, Section 14(C) of the contract, does not restrict an employee to concern over his own personal

property, Semancik called management's attention to the existence of the defect. While the crane repairman initially indicated that he would change the wheel, management vetoed the idea because various officials and supervisors believed that the crane could be safely operated. Manifestly, continued use of the spalled wheel could lead to further deterioration and bumping and slipping, as Respondent's witnesses readily conceded. In view of Semancik's competence and long experience in the operation of the crane, I find that his fears for the safety of the crane and the consequences resulting from the crane's continued operation if the spalled wheel were not changed were not arbitrary or capricious but furnished a reasonable basis for his decision to assert his Section 14(C) contractual right to be relieved of his job he regarded to be unsafe. Indeed, confirming the reasonableness of Semancik's evaluation and belief respecting the dangerous condition of the spalled wheel is the fact that the Respondent itself had removed the wheel from the crane because of a spall about 3½ months before the September 19 events here involved only to reinstall it 7 weeks later when a replacement for the new wheel was needed and another spare wheel was not available, although, to be sure, Semancik was not aware of these wheel changes. Moreover, on October 9, the spalled wheel was again replaced with a new carbonized wheel. The fact that another craneman ultimately was willing to, and did operate the crane in place of Semancik does not retract from Semancik's sincerely-held and reasonable belief that the spalled wheel created a condition rendering the crane unsafe "beyond the normal hazard inherent" in its operation.[33] Furthermore, contrary to the Respondent's contention, the issue before me is not whether an

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NOTE 32 — *(Continued)*

safety in invoking the right to relief but contemplates the safety of fellow workers, too.

33. *Roadway Express, Inc.*, 217 NLRB 278, 280; *Union Boiler Company*, 213 NLRB 818.

abnormal condition *actually* existed to entitle Semancik to be relieved of his job[34] but rather whether he *honestly believed* that such was the situation.[35]

In sum, I find that Semancik validly asserted his right under Section 14(C) of the collective-bargaining agreement to be relieved of his job operating the crane in the No. 5 Building which he in good faith believed was "unsafe ... beyond the normal hazard inherent in the operation." It follows that, by imposing the initial 5-day suspension upon him for exercising this right to refuse to operate the crane, the Respondent penalized Semancik for engaging in protected union and concerted activity for mutual aid and protection. Such conduct, I find, constituted a violation of Section 8(a) (1) and (3) of the Act. The fact, as urged by the Respondent, that it acted in the good faith belief that it was justified in disciplining Semancik for withholding his services and thereby causing an interruption of production is no defense where, as here, the activity for which Semancik was disciplined was actually protected by the Act.[36]

The same contractual provision entitling Semancik to relief from his job, permitted him to communicate these facts relating to the safety of that operation to the Company-assigned replacement, Roberts. As there is no evidence that Semancik, in the language of Section 14(C), had "take(n) any steps to prevent another employee (here,

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34. The issue presented in a number of arbitration awards relied upon by the Respondent concerned the merits of the question whether the grievants refused to perform work found to fall within the normal hazards of their jobs. Manifestly, this is not the issue before me.

35. It is undisputed that not involved in this case is the protection Section 502 of the Act affords employees who quit work "in good faith because of abnormally dangerous conditions for work ...." That provision requires "ascertainable, objective evidence" to support the employees' conclusion that abnormally dangerous working conditions existed. *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U.S. 368.

36. *Salt River Valley Water Users' Association* v. *N.L.R.B.* 206 F. 2d 325 (C.A. 9), enfg., in relevant part, 99 NLRB 849.

Roberts) from working on the job," I find that Semancik did not forfeit the right to relief which Section 14(C) of the contract otherwise extended to him. I further find that Roberts, on his part, was privileged to rely on Semancik's communication and his own personal observation of the spalled wheel to conclude that the crane was unsafe to operate, in the face of management's opposing opinion, and similarly to invoke his Section 14(C) contractual right to be relieved of his assignment. As in the case of Semancik, I find that Roberts acted in the good-faith belief that the spalled wheel created an unsafe working condition "beyond the normal hazard inherent in the operation" of the crane. Accordingly, I find that the Respondent imposed the initial 5-day suspension on Roberts in punishment for engaging in protected union and concerted activity and thereby violated Section 8(a) (1) and (3) of the Act. Lastly, I find that the Respondent violated the same statutory provisions when, following the disciplinary hearings, it extended the suspension of Semancik and Roberts for an additional 30 days because they adhered to and defended their original opinion and belief that the crane was unsafe to operate, entitling them to be relieved from such assignment.

With respect to the alleged
coercive remarks

I have previously found that during the second week following Roberts' return to work General Foreman Michaels remarked to Roberts in the course of their conversation that if Semancik had kept his mouth shut at his disciplinary hearing, the additional 30-day suspension would not have been imposed on them. As such a statement might well serve as a warning that adherence to, and a vigorous defense of employees' invocation of rights under a collective-bargaining agreement would lead to more severe disciplinary action then would otherwise be imposed, I find that the Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights to engage in protected union and other

concerted activities and thereby violated Section 8(a) (1) of the Act. However, I find that a similar statement made by General Foreman Miles to Grievance Committeeman Litavec not violative of the Act as it was made in the course of Miles' notification to Litavec as a union official of the Respondent's decision concerning the disciplinary action it was taking against Semancik and Roberts. Accordingly, this allegation of the complaint will be dismissed.

IV. The Remedy

Pursuant to Section 10(c) of the Act, as amended, it is recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and in any like or related conduct and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent unlawfully suspended employees Semancik and Roberts because of their protected union and concerted activities. To remedy this unfair labor practice, it is recommended that the Respondent be ordered to rescind the suspensions imposed upon these employees for such conduct and delete from their personnel files any reference to their suspensions. It is further recommended that the Respondent be ordered to make Semancik and Roberts whole for any loss of earnings they may have suffered from September 19[37] through

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37. Since Semancik and Roberts requested to be relieved of their assignments on September 19, 1977, they are not entitled to be paid for that day under the terms of the governing collective-bargaining agreement, except for the hours they actually were on the job. However, the record does not establish whether or not they would have voluntarily returned to work the next day had they not been suspended. As "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those which it was immune" *(N.L.R.B.* v. *Remington Rand, Inc.,* 94F. 2d 862, 872 (C.A. 2)), I find that the Respondent is obligated to reimburse Semancik and Roberts for loss of pay sustained by them during the indicated period.

October 29, 1977, the last day of their suspension, by reason of their unlawful suspension by payment to each of them of a sum of money equal to that which each one normally would have earned during the indicated period, less his net earnings during the said period. Backpay shall be computed with interest as prescribed by the Board in *Florida Steel Corporation,* 231 NLRB No. 117. (See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 176.) To facilitate the computation, the Respondent shall make available to the Board, upon request, payroll and other records necessary and appropriate for such purposes. The posting of an appropriate notice is also recommended.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending employees Edward J. Semancik and Francis Roberts because of their refusal to operate an overhead crane which they believed to be unsafe "beyond the normal hazard inherent in ... (its) operation" and requested to be releived of their assignments pursuant to the terms of the collective-bargaining agreement between the Union and the Respondent then in effect in the plant, the Respondent violated Section 8(a) (1) and (3) of the Act.

4. By impliedly warning an employee that adherence to, and a vigorous defense of employees' invocation of rights under a collective-bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed, the Respondent interfered with, restrained and coerced employees in the exercise of their Section 7 rights to engage in protected union and other concerted activities and thereby violated Section 8(a) (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. General Foreman Miles' statement to Grievance Committeeman Litavec was not violative of Section 8(a) (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[38]

ORDER

The Respondent, Wheeling-Pittsburgh Steel Corporation, Allenport, Pennsylvania, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise disciplining employees for exercising rights under the collective-bargaining agreement between their bargaining representative, the United Steelworkers of America and its Local No. 1187, AFL-CIO-CLC, and the Respondent, or for otherwise engaging in protected union or concerted activity for mutual aid and protection with respect to wages, hours, or other terms and conditions of employment.

(b) Warning employees that adherence to, and a vigorous defense of their invocation of rights under a collective-bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed.

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38. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind the suspensions imposed on employees Edmond J. Semancik and Francis Roberts on September 19 and 23, 1977 and delete from their personnel files any reference thereto.

(b) Make Edmond J. Semancik and Francis Roberts whole for any loss of earnings they may have suffered by reason of their unlawful suspensions, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful in analyzing the amount of backpay due under the terms of this recommended Order.

(d) Post at its plant in Allenport, Pennsylvania, the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to

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39. In the event that the Board's Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint be, and it hereby is dismissed insofar as it alleges conduct not found herein to be in violation of the Act.

Dated, Washington, D.C. December 11, 1978

Paul Bisgyer
Administrative Law Judge

FORM NLRB-4727
(9-69)

JD-810-78

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT suspend, discharge or otherwise discipline employees for exercising rights under the collective-bargaining agreement between us and the employees' collective-bargaining representative, the United Steelworkers of America and its Local 1187, AFL-CIO-CLC, or for otherwise engaging in protected union or concerted activity for mutual aid and protection with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT warn or threaten employees that adherence to, or a vigorous defense of their invocation of their rights under a collective-bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL rescind the suspensions imposed on employees Edmond J. Semancik and Francis Roberts on September 19 and 23, 1977 and delete from their personnel files any reference thereto.

WE WILL make Edmond J. Semancik and Francis Roberts whole for any loss of earnings suffered by reason of their unlawful suspensions.

WHEELING-PITTSBURGH STEEL CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building - 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone (412) 644-2973.

241 NLRB No. 198 D - 4993
Allenport, Pa.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

WHEELING-PITTSBURGH STEEL CORP.

and Case 6 — CA — 10586

EDWARD SEMANCIK, *an Individual*

DECISION AND ORDER

On December 11, 1978, Administrative Law Judge Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, both Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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1. Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

We also deny the General Counsel's motion to strike certain arbitration decisions attached to Respondent's brief as lacking in merit.

2. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wheeling-Pittsburgh Steel Corporation, Allenport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Adminsitrative Law Judge.

Dated, Washington, D.C. April 30, 1979

John H. Fanning, Chairman

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

NOTE 2 — *(Continued)*

to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F. 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the absence of exceptions, we adopt, *pro forma,* the Administrative Law Judge's finding and conclusion that a statement made by General Foreman Miles to Grievance Committeeman Litavec did not violate Sec. 8(a) (1) of the Act.

UNITED STATES COURT OF APPEALS

For The Third Circuit

No 79-1568

WHEELING-PITTSBURGH STEEL CORP.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

ON PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Board No. 6-CA-10586)

Argued February 11, 1980

Before ADAMS, VAN DUSEN and GARTH,
Circuit Judges

(Opinion filed April 14, 1980)

Donald L. Dotson, Esq. (Argued)
Francis P. Massco, Esq.,
Pittsburgh, Pa.,
Attorneys for Petitioner

Candace M. Carroll, Esq. (Argued),
Norton J. Come, Acting General Counsel
John E. Higgins, Jr., Deputy General Counsel
Robert E. Allen, Acting Associate General Counsel
Elliott Moore, Deputy Associate General Counsel
National Labor Relations Board,
Washington, D.C.
Attorneys for Respondent

OPINION OF THE COURT

Van Dusen, *Senior Circuit Judge.*

Wheeling-Pittsburgh Steel Corporation (the Company) petitions this court for review of the April 30, 1979, decision and order of the National Labor Relations Board (the Board). The Board cross-applies for enforcement of its order. The Board found that the Company had committed unfair labor practices in violation of §§8(a) (1) and 8(a) (3) of the National Labor Relations Act (the Act), 29 U.S.C. §§158(a) (1), (3),[1] by suspending two employees for invoking their contractually protected right not to work under conditions they believed to be unsafe. The Board also found that the Company had violated §8(a) (1) of the Act due to a remark made by a foreman concerning the length of the suspension. Based on the findings of unfair labor practices, the Board ordered the Company to rescind the suspensions, to delete any references to the suspensions from the personnel files, to compensate the two employees for the earnings they lost while suspended, to cease and desist from engaging in the unfair labor practices, and to post notices informing the employees that they will not be subjected to these or similar unfair labor practices. We will deny the petition for review and enforce the Board's order insofar as it relates to the suspension of the two employees. We will grant the Company's petition and

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1. 29 U.S.C. §158(a) provides in pertinent part:
"§158. Unfair labor practices
"(a) It shall be an unfair labor practice for an employer —
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employemnt to encourage or discourage membership in any labor organization ...."

deny enforcement of those portions of the order relating to the foreman's remark.[2]

1.

The Company produces steel and steel products. Its facility at Allenport, Pennsylvania, converts semi-finished steel into sheet and tubular products. Approximately 2600 employees work at the Allenport facility: of these 2400 are represented by the United Steelworkers of America (the union). Section 14(C) of the 1977-1980 collective bargaining agreement between the Company and the union provides that employees who believe their working conditions are abnormally unsafe or unhealthy are entitled to refuse to work without losing their right to return to their jobs.[3] This provision has been included in the collective bargaining agreements since the Company was formed in 1969. The agreement also contains a grievance and arbitration procedure, a no-strike clause, and a provision that an employee cannot be suspended more than five days without a hearing.

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2. Because we have decided that the Board properly exercised its discretion in not deferring to arbitration in view of the record in this case (see II, *infra),* we will deny the motion filed by the Company on February 19, 1980, seeking to vacate the Board's order or, in the alternative, to remand for a clarification of the Board's deferral practices.

3.

"Section 14(C). DISPUTES

An employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall have the right to:

1. File a grievance in the Second Step of the complaint and grievance procedure for preferred handling in such procedure and arbitration; and/or
2. Relief from the job or jobs, without loss to their right to return to such job or jobs, and, at Management's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job,

In Building Number 5 at the Tube Mill at Allenport, tubes and pipes are received, cut, threaded, painted, tested, inspected, and loaded onto railroad cars for shipment. Building Number 5 operates three shifts a day, seven days a week, with one crane operator and approximately 35 employees per shift. It contains an electric overhead crane which rides on rails mounted 30 feet above the floor, 115 feet apart from each other, and which extend the length of the building. The bridge of the crane spans the 115-foot width and rests on wheels which roll along the rails. The crane can lift loads weighing up to 7½ tons. Loads of pipe are either tied to, or cradled in,[4] the crane's hoist mechanism by employees known as "hookers" who work on the production floor.

On September 19, 1977, Edmond Semancik was operating the crane in Building Number 5. Semancik had operated that crane on a regular basis for three years. He had never before refused to operate the crane for safety or any other reasons. On this particular morning Semancik observed that the crane was riding more roughly than usual. The crane was bumping and sliding along the rails, causing the loads of pipe to rock and sway. Semancik stopped the crane to investigate and discovered a hole in the tread face of one of the wheels.

NOTE 3 — *(Continued)*

shall take any steps to prevent another employee from working on the job, provided he first reports the matter to his committeeman or foreman. Should either the Management or the Arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the Employee not have been assigned to other available, equal or higher-rated work, he shall be paid for the earnings he otherwise would have received.

It is recognized that emergency circumstances may exist and the local parties are authorized to make mutually satisfactory arrangements for immediate arbitration to cover such situations in an expeditious manner."

4. Some loads of pipe are tied, that is, bundled to the hooks of the crane with tightly wrapped cables; others are cradled; lifted in two loops of cable which have not been tightened around the load.

The hole measured approximately 3½ inches long, 2½ inches wide, and ½ inch deep. Semancik had never seen such a hole in a crane wheel.[5] He testified that when the hole met a joint in the rail it caused the crane to slide suddenly, which in turn caused the load of pipes to sway. Semancik reported this to the production foreman and asked him to call the crane repairman. When the repairman arrived, Semancik showed him the wheel. When the repairman asked if Semancik wished to have the wheel changed, Semancik answered in the affirmative. The repairman left to get the equipment necessary to change the wheel and to report to his supervisor, Charles Michaels, the general foreman of shop services. The repairman returned and informed Semancik that Michaels had decided not to halt production and change the wheel. Semancik said that Michaels must not have understood the situation and, accompanied by the two employees who were working as "hookers" on that shift, walked to Michaels' office. Michaels told Semancik that the wheel was not going to be changed and ordered Semancik to run the crane or to go home. Semancik stated that he was invoking his right under §14(C) of the collective bargaining agreement to be relieved of an unsafe job.

Semancik returned to the crane where he met the crane repairman and the crane repair foreman. Semancik operated the crane while they stood on the bridge observing the wheel. The repair foreman declared that the rails appeared to be slippery and needed sanding, but that 16
the wheel was safe. During the sanding process one of the foreman noticed that the crane was out of alignment, "which could cause bumping, thumping and other noises." App. at 446a. He proceeded to realign the crane.

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5. Unbeknownst to Semancik, this hole or "spall" had first been discovered in a routine inspection in May 1977. The affected wheel was removed two weeks later and replaced with a new, carbonized wheel. On July 31, 1977, the axle on the newly installed wheel broke. The previously removed wheel, which had been kept as a spare, was reinstalled. It, in turn, was replaced with another new wheel on October 9, 1977. See App. at 453a.

After the wheels were sanded and the crane realigned,[6] the foremen concluded that any previous rough operation of the crane had been remedied and asked Semancik to resume operating the crane. When Semancik said that he was invoking his §14(C) rights, the production foreman told him he was suspended. Semancik telephoned the union president. Semancik then told the general foreman that he was relying on §14(C) in refusing to operate the crane. The general foreman reiterated that Semancik was suspended and ordered a replacement crane operator. At that point the union president arrived and told Semancik that he had a right under §14(C) to inform the replacement of the condition which he believed to be unsafe, but not to attempt to persuade the replacement to refuse to work. Semancik described the condition of the wheel to the first replacement, who inspected the wheel and then invoked his §14(C) right not to work.[7] When the second replacement, Francis Roberts, arrived, Semancik again pointed out the hole, visible from the production floor, and stated that he had asked to be relieved from his job under §14(C) because the crane was not operating properly. Roberts decided that he too would invoke his

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6. Carroll, the superintendent of electrical maintenance, observed the spalled wheel and the operation of the crane after it had been realigned. He concluded that (1) the spalled area did not come in contact with the rails, (2) there was no bumping or thumping, which can be caused by the crane's being out of alignment, as the crane rode back and forth on the rails, (3) the wheel was safe and did not need to be changed immediately, but that a change could be scheduled for the "Normal downturn" which was due to take place the next weekend or so, and (4) meanwhile it was safe to operate the crane. The managers and supervisors conferred among themselves and unanimously reached the conclusion that the spalled wheel did not create an unsafe or dangerous condition in the operation of the crane. Also, they were of the opinion that Semancik and Roberts acted without a reasonable basis for their belief that the wheel was dangerous. See App. at 446a-447a.

7. This replacement was not suspended because he was a new employee who was not yet fully qualified to operate the crane App. at 155a. 448a.

§14(C) rights. Although the foreman told Roberts that management believed the crane was safe and urged him to operate the crane, Roberts insisted on his right under §14(C) to refuse to work under unsafe conditions. Roberts was then suspended. Shortly thereafter, he and Semancik left the building and went home.

The union president left, stating that he was going to file a safety complaint with the Occupational Safety and Health Administration. The union grievance committeeman, who had arrived a short time earlier, remained. When a third replacement crane operator reported, the committeeman informed him about the hole in the wheel and the suspension of Semancik and Roberts. The division superintendent assured him the crane was safe. This operator inspected the wheel and briefly operated the crane. He agreed to operate it at a slow speed on the condition that he not be held responsible if anything went wrong due to the hole in the wheel. He operated the crane without incident for the rest of the day.[8]

The general foreman telephoned Semancik and Roberts on the afternoon of September 19 and informed them that they had been suspended for five days, the longest period of suspension without a prior hearing permitted by the collective bargaining agreement. Disciplinary hearings for both employees were held on September 23, Semancik, represented by the union committeeman and the acting union president, contended that he had properly invoked his contractual right, had been unjustly suspended, and was entitled to reinstatement with back pay. The Company charged that no hazardous condition had existed on September 19, that Semancik had been unreasonable in not accepting management's opinion that the crane was safe, and that he had unjustifiably refused to work, causing a loss in the scheduled production.

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8. In fact, the wheel in dispute was not replaced until October 9, 1977 (see note 5, *supra*). The crane operated without incident in the interim.

The hearing became heated. Semancik insisted he had not been unreasonable in refusing to operate the crane.

Roberts' hearing followed. The same union and management representatives were present. The same matters were discussed, but the verbal exchange was less heated.

After the hearings the management representatives conferred and decided to suspend Semancik and Roberts for an additional 30 days to punish them for being inflexible and unreasonable and refusing to concede that they had been wrong. See App. at 452a. The employees were notified of their extended suspensions. They returned to work on October 30, 1977. Shortly thereafter, Roberts told Michaels, the general foreman, that he and Semancik had not deserved 30-day suspensions. Michaels responded by saying that the additional discipline would not have been imposed if Semancik had "kept his mouth shut at the meeting" App. at 113a-114a.

II.

In its petition for review, the Company argues that the dispute here concerned contract interpretation, rather than violations of the national labor laws. Consequently, it is the Company's position before this court that the Board should have refrained from acting and allowed the arbitration machinery to resolve the issues. The Board asserts that the contract issue was only incidental to the alleged unfair labor practice. Moreover, according to the Board, even when the resolution of a contract issue is more central to a case, the Board is not pre-empted by the overlapping domain of the arbitrator. In this the Board is correct. As the Supreme Court stated in *National Labor Relations Board v. Strong,* 373 U.S. 357,360-61 (1969):

> "(I)n some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe

> conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract." (Citations and footnote omitted.)

See National Labor Relations Board v. C & C Plywood Corporation, 385 U.S. 421 (1967); *Mastro Plastics Corp. v. Labor Board,* 350 U.S. 270 (1956).

Although not ousted from jurisdiction by the presence of contractual issues, the Board may choose to defer to the arbitration process. *Collyer Insulated Wire,* 192 N.L.R.B. 837 (1971). In *Carey v. Westinghouse Electric Corporation,* 375 U.S. 261, 271-72 (1964), where 29 U.S.C. §§158(b)(4)(D) and 160(k) were applicable, the Supreme Court noted with approval the Board's discretionary practice of deferral. *Cf. Smith v. Evening News Association,* 371 U.S. 195, 198 n. 6 (1962). The Board has exercised its discretion to defer not only when there is an outstanding arbitral award. *Spielberg Manufacturing Company,* 112 N.L.R.B. 1080. 1082 (1955),[9] but also in some circumstances when no award has yet been issued. *Collyer Insulated Wire,* 192 N.L.R.B. at 841-42.[10] The Board has indicated that the party seeking deferral must raise it before the adminis-

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9. In *Spielberg Manufacturing Company.* 112 N.L.R.B. 1080 (1955), the Board refrained from exercising jurisdiction and deferred to an arbitrator's decision on the merits. The Board summarized its policy of deferring in cases where an arbitrator's award is present if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the (National Labor Relations) Act." *Id.* at 1082.

10. In *Collyer Insulated Wire,* 192 N.L.R.B. 837 (1971), the Board deferred to arbitration proceedings which had not been completed at the time of the unfair labor practice hearing. The Board identified three factors which supported the exercise of its discretion to defer: (1) a long-standing bargaining relationship with clear-

trative law judge, and must state the factors which make deferral appropriate for that particular case. *MacDonald Engineering Company,* 202 N.L.R.B. 748, 748 (1973); *see Montgomery Ward & Company,* 195 N.L.R.B. 725, 725 n. 1 (1972). This court in *Food Fair Stores, Inc. v. National Labor Relations Board,* 491 F.2d 388, 395-96 n. 9 (3d Cir. 1974), recognized the Board's practice of considering deferral only if raised as an affirmative defense. In approving this policy, the court highlighted two reasons justifying the requirement that deferral be raised as an affirmative defense:

> "First, the failure to raise such a defense may indicate that neither party to the contract desires arbitration — a factor clearly mitigating against deferral Second, the rule assures that the Board will have the opportunity of deciding whether to defer to arbitration after hearing all the facts relevant to the appropriateness of deferral in each particular situation."

Id. At oral agrument, when queried as to whether it had requested deferral, the Company called attention to the written opening statement it introduced at the hearing before the administrative law judge (ALJ) and to the exceptions to the decision of the ALJ it raised before the

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NOTE 10 — *(Continued)*

ly defined and tested grievance-arbitration procedures; (2) the absence of evidence of anti-union animus; and (3) a dispute which is well suited to resolution by arbitration.

In 1977 a change, attributable to a change in the membership of the Board, in this policy developed. *In General American Transportation Corporation,* 228 N.L.R.B. 808 (1977), the Board, in a split vote, announced the following policy: although the Board has the authority to defer to ongoing arbitration proceedings, the Board will not exercise its discretion to defer in instances where §§8(a)(1) and 8(a) (3) have allegedly been violated. Since that time the Board has not deferred in §8(a) (1) and §8(a) (3) cases.

There is no need to address the merits of the doctrines in the cases cited in notes 9 and 10 of this opinion on the record in this case.

Board. We have carefully reviewed the opening statement and find no request in it for deferral. Similarly, our examination of the 42 exceptions was fruitless. Indeed, the word "deferral" was not mentioned even once in the record, nor did the Company enumerate to the ALJ those facts it considered supportive of the appropriateness of deferral in this particular situation. Moreover, at the hearing the Company never even stated that there were ongoing arbitration proceedings; the ALJ raised this issue on his own. App. at 17a. Only in response to the ALJ's question did the Company answer that a grievance had been filed and that it was "expected in due course that it would go to arbitration." App. at 18a. The Company, however, never hinted that it was raising the affirmative defense of deferral.[11] It certainly never pressed the issue before the ALJ and the Board. Because we find the record barren of any explicit request for deferral in this case, we cannot say the Board in this case abused its discretion by proceeding to consider the unfair labor practices charge.

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11. Although in its petition for review the Company does not claim that remarks made at the hearing constitute a request for deferral, we note that the matter of arbitration was discussed. We believe that a fair reading of that discussion leads to the conclusion that the Company was urging the ALJ to consider the pertinent arbitral law in reaching his decision on the unfair labor practice charge, rather than requesting deferral. Implicit in the plea to the ALJ to give weight to the interpretations of past arbitrators is the idea that the ALJ will be deciding the case, not deferring. The pertinent passage follows:

> "MR. DOTSON: We will elaborate on this later, but I would like at this point to invite the Court's attention to the fact that there is a substantial body of arbitual law which is the common law of our agreement sustaining the corporation's position in awarding discipline under facts, identical and similar to those involved in this case.
>
> "But I think it's important for the Court to understand from the out-set that the provision we are dealing with in the contract is identical to that found in the basic Labor agreements of the basic steel industry.
>
> "It has been arbitrated many times and the Court must

III.

If the Board's decision is supported by "substantial evidence on the record as a whole," we are bound to enforce its order. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company v. National Labor Relations Board,* 305 U.S. 197, 229 (1938): *see Tri-State Truck Service, Inc. v. National Labor Relations Board,* No. 79-1611 (3d Cir. Feb. 13, 1980). Turning first to the suspensions of Semancik

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NOTE 11 — *(Continued)*

look at the consistent interpretations that have been placed on that provision to have a proper understanding of the case.

"You simply can't take, as I am sure Your Honor knows, the bare language of an agreement and have an accurate understanding of how it has been implemented and how it will be implemented.

"JUDGE BISGYER: Has this matter gone to arbitration?

"MR. DOTSON: A grievance has been filed and it is expected in due course that it will go to arbitration.

"We have a typical grievance arbitration procedure final and binding in cases of contract interpretation as well as discipline. We have a permanent umpire and the system has worked well for many years.

"MR. ELAM: Well, Your Honor, we would take the position that whether or not the employees' claim was found to be meritorious under the contract, the employee still has the right to raise issues under the contract which he believes to be covered by the contract and is engaging in protected activities, even should his claim turn out to be non-meritorious.

"JUDGE BISGYER: Well, let's proceed. There hasn't been an award, and if there were an award, and the General Counsel had claimed that the award was repugnant to the rights accorded parties under the Act, we'd go through the procedure to determine what the facts are, and to determine whether the award coincides with the law."

"App. at 17a-18a.

and Roberts, we hold that the Board's conclusion that these incidents constituted an unfair labor practice in violation of §8(a) (1) of the Act is supported by substantial evidence on the record as a whole.

Section 7 of the Act 29 U.S.C. §157, provides in pertinent part:

> "Employees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection . . .

"Section 8(a) (1) provides:

> "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title(.)"

The Company admits that it suspended Semancik and Roberts for refusing to operate the crane in Building Number 5. The Company denies, however, that these suspensions constitute an unfair labor practice. It asserts that these employees were not exercising rights protected by §7 when they were suspended. The Company characterizes Semancik's and Roberts' refusals to operate the crane as individual acts, not concerted activity. However, we cannot say that the Board's conclusion in this regard is erroneous.

The record reveals that this incident involved more than individual refusals by Semancik and Roberts. When Semancik invoked his rights under §14(C) of the collective bargaining agreement, he declared that the safety of the employees working on the floor below was endangered, as well as his own. App. at 456a. When he went to discuss the condition of the wheel with Michaels, the electric shop foreman, two other employees working with the crane accompanied him. App. at 443a.[12] Roberts

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12. These were "hookers," see p. 4, *supra,* employees whose safety would likely be most endangered if the pipes suspended from the crane slipped or swung haphazardly.

spoke to Semancik about the possible hazard before he decided to refuse to operate the crane. Thus, from the beginning there was some group action by fellow workers in the interest of employee safety. Further, the union was also involved. Semancik contacted his union representatives before he left the building on the morning of September 19, 1977. At his request, the union president and union grievance committeeman came to the site of the incident. App. at 448a-449a. The union represented Semancik and Roberts at their hearings on September 23. Additionally, the union president filed a complaint with the Occupational Safety and Health Administration concerning the potential danger the wheel created for all the employees.[13] On this record it would be fair to say that Semancik and Roberts acted here as sokesmen for the safety of all the employees, and that the employees — as indicated by the union's actions — shared this safety concern. 15

Support for this analysis is provided by *Mushroom Transportation Company v. National Labor Relations Board,* 330 F. 2d 683 (3d Cir. 1964) There the court recognized that, while mere griping by an employee about his individual concerns is not protected under §7, some statements by individuals do rise to the level of concerted activity. The court emphasized:

> "It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged

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13. On September 19, the date Semancik discovered the hole in the wheel, the union president telephoned the Occupational Safety and Health Administration (OSHA) to report the hazardous condition of the wheel. Semancik and Roberts responded to OSHA's request for more information. An OSHA representative visited the plant two days later and inspected the wheel. OSHA issued a citation requiring the Company to remedy the situation by November 7, 1977. The wheel was, in fact, removed on October 9. Apparently, OSHA scheduled a hearing on the citation, but the citation was withdrawn and a hearing never took place. See App. at 453a.

in with the object of initiating or inducing or preparing for group action or that it *had some relation to group action in the interest of the employees.*

* * *

"Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do *without involving fellow workers or union representation* to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.' "

Id. at 685 (emphasis supplied). In light of the fact that both the action of fellow workers and union representation were present in this case, we conclude that there is substantial evidence to support the Board's findings of concerted activity within the meaning of §7 of the Act.[14]

Similarly, there is evidence in the record to support the finding that the actions of Semancik and Roberts were not only concerted, as opposed to individual, but also undertaken for mutual aid or protection. Indeed, the very evidence discussed above supports this finding. It was the concern for the safety of the other employees, as well as themselves, that motivated Semancik and Roberts.

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14. Our decision in *National Labor Relations Board v. Northern Metals Company,* 440 F. 2d 881 (3d Cir. 1971), is not applicable to this record. Because there is ample evidence in the record to support the finding that the refusals to operate the crane were not solitary acts by individual employees, we need not reach the issue of constructive concerted activity. We note that this court in *Northern Metals, supra* at 884, declined to follow the constructive concerted activity doctrine enunciated in *National Labor Relations Board v. Interboro Contractors, Inc.,* 388 F. 2d 495 (2d Cir. 1967).

Although concerted action for mutual aid or protection is generally protected under §7 of the Act, there are certain types of concerted activity which fall outside the shelter of §7. Activities which are unlawful, violent, or in breach of contract are unprotected. *National Labor Relations Board v. Washington Aluminum Company,* 370 U.S. 9, 17 (1962). *See National Labor Relations Board v. Sands Manufacturing Company,* 306 U.S. 332, 345 (1939). The Company urges that the actions of Semancik and Roberts violated the collective bargaining agreement and thus are unprotected. Specifically, the Company argues that the refusals of Semancik and Roberts to operate the crane were not in good faith within the meaning of §14(C) of the collective bargaining agreement. Therefore, according to the Company, they were properly subject to discipline. The Company contends that the ALJ erred in declining to use the good faith test fashioned by some arbitrators in interpreting clauses similar to §14(C). The Company insists that both prongs of this test must be met: (1) sincere belief, and (2) reasonable basis in fact.

The ALJ noted that the disputed clause pertains to "employees who believe they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question". He distinguished the arbitration cases defining good faith which the Company presented, and stated that he believed that the good faith component of §14(C) required only that the employee have a sincere belief that an abnormally hazardous condition existed and that he not invoke the clause as a pretext. App. at 454a-455a. The ALJ also went further and made specific findings that the actions of Semancik and Roberts were both sincere and reasonable.[15]

Our review of the record indicates that there is substantial evidence to support these findings. It is undisputed

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15. We note that in *National Labor Relations Board v. Modern Carpet Industries, Inc.*, No. 78-1749 (10th Cir. Dec. 28, 1979), the

that Semancik was an experienced crane operator. The production foreman testified that Semancik was one of the best cranemen he had ever supervised. App. at 213a. He had never before refused to work for safety reasons or any other reasons. On the morning of September 19, he experienced difficulty in operating the crane smoothly. Upon inspection, he discovered a hole in the tread face of one of the wheels of the crane. He had never before seen such a hole on a crane wheel. He immediately reported it to his supervisor, indicated his concern for the safety of himself and others, and requested that the wheel be changed. The Company argues that Semancik was unreasonable because he continued to believe that the wheel constituted a hazard in the face of the contrary opinions voiced by Company officials. A number of supervisors did attest to the safety of the crane at the time of the incident; not all of them were knowledgeable about electrical crane maintenance, however. See, *e.g.*, App. at 194a, 216a, 218a. Although at least two were qualified in this field (Board's brief at 32-33 n. 25), we believe that there is substantial evidence to support the ALJ's findings that, in light of Semancik's experience and skill, the crane operators' refusal to work for safety reasons on September 19 had a reasonable basis in fact and did not constitute a breach of contract.[16]

NOTE 15 — *(Continued)*

Tenth Circuit apparently adopted the NLRB's position that a good faith belief that working conditions are abnormally hazardous need not be reasonable so long as it is sincere. We do not address this issue because, as explained in the text at pages 16-17 below, there is evidence in this case to support the ALJ's findings that the employees' actions were reasonable as well as sincere.

16. The Company asserts that the uneven functioning of the crane on September 19 was due not to the hole in the wheel but to misalignment of the crane. We conclude, however, that on this record there is substantial evidence to support the ALJ's finding that Semancik and Roberts were entitled to act on their belief that a dangerous condition continued to exist after the realignment.

Accordingly, the Board's conclusion that the conduct of Semancik and Roberts on September 19, 1977, was protected by §7 of the Act, and that the Company therefore violated §8(a) (1) of the Act by disciplining them for that conduct, is supported by substantial evidence on the record as a whole.

IV.

The Board upheld the ALJ's conclusion that the suspensions of Semancik and Roberts also constituted an unfair labor practice in violation of §8(a) (3) of the Act. This section provides:

> "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

A violation of this section is based upon the existence of both discrimination and a resulting discouragement of union membership. Generally, a finding of anti-union purpose must also be present. *American Ship Building Company v. National Labor Relations Board,* 380 U.S. 300, 311 (1965). The Supreme Court has explained the significance of the employer's motive in §8(a) (3) cases.

> "It has long been established that a finding of violation under this section will normally turn on the employer's motivation. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees suspicion of the employer's true intention.

> But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. Such a construction of §8(a) (3) is essential if due protection is to be accorded the employer's right to manage his enterprise."

Id. (citations omitted). There is some conduct, however, which is so "inherently destructive of employee interests" that proof of improper motive is not necessary. *National Labor Relations Board v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967).

In this case, the decision of the ALJ, adopted without modification by the Board, focused on the §8(a) (1) claim. Indeed, the §(a) (3) claim was only discussed in a portion of one sentence. Without any factual basis, the ALJ simply maintained:

> "(The employer's action in disciplining Semancik and Roberts) constitutes, as well, discrimination which discourages employees from relying on the fruits of a collective bargaining contract secured for them by their collective bargaining agent in violation of Section 8(a) (3)."

App. at 454a. No attempt was made to document this assertion or to analyze the situation to determine whether it was likely that discouragement of union membership would result. Moreover, a careful examination of the record reveals that the evidence of anti-union animus is non-existent. In face of the lack of factual underpinnings for the ALJ's assertion, the absence of anti-union purpose, and the absence of any contention that the suspensions at issue are so "inherently destructive of employee interests" that improper motive is irrelevant, we cannot say that this barren record supports a finding that the Company violated §8(a) (3). Accordingly, we hold that the Board's conclusion that the Company

violated §8(a) (3) is not supported by substantial evidence on the record as a whole.

V.

Lastly, the Board concluded that a remark made by Michaels, the general foreman, constituted an unfair labor practice in violation of §8(a) (1). As noted above, this section of the Act protects employees in the exercise of their §7 rights (see discussion at p. 12). The ALJ made a specific factual finding that after the two employees returned to work from their suspension Roberts remarked to Michaels that they had not deserved the 30-day suspensions. Michaels answered that the lengthy suspension would not have been imposed if Semancik had "kept his mouth shut" at the hearing. App. at 453a. The ALJ concluded that this remark by Michaels "interfered with, restrained and coerced employees in the exercise of their Section 7 rights to protected union and other concerted activities" (in that) "such a statement might well serve as a warning that adherence to and a vigorous defense of employees' invocation of rights under a collective bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed." App. at 458a.

To establish a §8(a) (1) violation, it must be shown that, in light of all the existing circumstances, the employer's conduct may "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *National Labor Relations Board v. Armcor Industries, Inc.*, 535 F. 2d 239, 242 (3d Cir. 1976). *See Local 542, International Union of Operating Engineers v. National Labor Relations Board*, 328 F. 2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964). The fact-finder must determine whether a threat, either latent or overt, is contained in the employer's words. *National Labor Relations Board v. Triangle Publications, Inc.*, 500 F. 2d 597, 599 (3d Cir. 1974); *Mon River Towing, Inc. v. National Labor Relations Board*, 421 F. 2d 1, 9-10 (3d Cir. 1969). As with other findings, the appellate court must review the Board's determination to

ensure that it is reasonable and supported by substantial evidence. *Id.*

Judged by these standards, we find unreasonable the ALJ's determination that coercion and threat of reprisal were implicit in the comment made by Michaels. It is undisputed that Michaels did not initiate the conversation, but, rather, only responded to a comment made by Roberts. Apparently the whole exchange totalled only two sentences. There is no evidence in the record to indicate that this remark was made in a hostile or vindictive tone. As stated earlier (see p. 18, *supra.),* there is no evidence of anti-union animus on the part of the employer. Further, it is undisputed that Semancik had responded heatedly at his disciplinary hearings. The remark by Michaels thus was not an inappropriate comment on the tenor of the hearing. In sum, the record reveals that Michaels made a single, isolated, non-hostile, comment in response to a remark by Roberts. A review of the record as a whole compels us to conclude that the finding by the ALJ that this remark reasonably tended to coerce or intimidate employees is not supported by substantial evidence. Therefore, we conclude that the Board erred in deciding that this incident constituted an unfair labor practice in violation of §8(a) (1).

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VI.

In conclusion, we hold that under the circumstances of this case the Board did not abuse its discretion in not deferring to a pending, uncompleted arbitration proceeding. We further hold that on the record considered as a whole there is substantial evidence that the Company committed an unfair labor practice, in violation of §8(a) (1), when it suspended Semancik and Roberts. We believe, however, that substantial evidence does not exist to support the conclusion that the Company violated §8(a)(3) by suspending these two employees. Nor is there substantial evidence that the remark by general foreman Michaels constituted an unfair labor practice in violation of §8(a) (1). Accordingly, insofar as the Board's order

relates to the suspension of Semancik and Roberts in violation of §8(a) (1), we will enforce the Board's order and deny the Company's petition for review.[17] Insofar as the Board's order relates to the remark made by Michaels, we will deny enforcement of the Board's order and grant the Company's petition.

For the foregoing reasons, the order of the Board shall be modified by deleting (1) paragraph 1(b) of the order of the Board, and (2) the second paragraph of the Notice to Employees, [18] and, as so modified, the order will be enforced.

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17. As the Board concluded on alternative grounds (§8(a) (1) and §8(a) (3)) that the suspensions were unlawful, and we have upheld the Board on one of its theories (§8(a) (1)), the relief granted to remedy the suspensions must be afforded to the employees.

18. Paragraph 1(b) of the order states that the Company shall cease and desist from

> "(w)arning employees that adherence to, and a vigorous defense of their invocation of rights under a collective-bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed."

App. at 460a.

The second paragraph of the notice ordered by the Board states:

> "WE WILL NOT warn or threaten employees that adherence to, or a vigorous defense of their invocation of their rights under a collective bargaining agreement would lead to more severe disciplinary action than would otherwise be imposed.

App. at 437a.

Of course, the Company may not lawfully threaten employees with more severe disciplinary action than otherwise would be imposed if they invoke their rights under the collective bargaining agreement. The presence of these paragraphs in the order and notice, however, implies that the Company has made such unlawful threats. Since we have found that coecive remarks did not occur here, we conclude that this implication is improper and that these paragraphs should be excised.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

No. 79-1568

WHEELING-PITTSBURGH STEEL CORP.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

JUDGMENT

Before: ADAMS, VAN DUSEN and GARTH,
Circuit Judges

THIS CAUSE came to be heard upon a petition filed by Wheeling-Pittsburgh Steel Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on April 30, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 11, 1980, and has considered the briefs and transcript of record filed in this cause. On April 14, 1980, the Court, being fully advised in the premises, issued its opinion granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Wheeling-Pittsburgh Steel Corporation, Allenport, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise disciplining employees for exercising rights under the collective-bargaining agreement between their bargaining represen-

tative, the United Steelworkers of America and its Local No. 1187, AFL-CIO-CLC, and the Petitioner, or for otherwise engaging in protected union or concerted activity for mutual aid and protection with respect to wages, hours, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act.)

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Rescind the suspensions imposed on employees Edmond J. Semancik and Francis Roberts on September 19 and 23, 1977 and delete from their personnel files any reference thereto.

(b) Make Edmond J. Semancik and Francis Roberts whole for any loss of earnings they may have suffered by reason of their unlawful suspensions, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and useful in analyzing the amount of backpay due under the terms of this Judgement.

(d) Post at its plant in Allenport, Pennsylvania, the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 6 of the National Labor Relations Board (Pittsburgh, Pennsylvania), after being duly signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

BY THE COURT

Circuit Judge

DATED: May 21, 1980

Certified as a true copy and issued in lieu of a formal mandate on July 10, 1980.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

APPENDIX
NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT suspend, discharge, or otherwise discipline employees for exercising rights under the collective-bargaining agreement between us and the employees' collective-bargaining representative, the United Steelworkers of America and its Local 1187, AFL-CIO-CLC, or for otherwise engaging in protected union or concerted activity for mutual aid and protection with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL rescind the suspensions imposed on employees Edmond J. Semancik and Francis Roberts on September 19 and 23, 1977, and delete from their personnel files any reference thereto.

WE WILL make Edmond J. Semancik and Francis Roberts whole for any loss of earnings suffered by reason of their unlawful suspensions, with interest.

WHEELING-PITTSBURGH STEEL CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania, 15219, Telephone 412-644-2969.

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-583

In the Supreme Court of the United States

OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (1) of the National Labor Relations Act by suspending two employees for asserting their right under a collective bargaining agreement to refuse to operate a defective crane that they reasonably and in good faith believed to be dangerous to themselves and to their fellow employees.

2. Whether the Board's remedial order was proper.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-59a) is reported at 618 F.2d 1009. The decision and order of the National Labor Relations Board (Pet. App. 1a-37a) are reported at 241 N.L.R.B. No. 198.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-62a) was entered on May 21, 1980, and a timely petition for rehearing was denied on July 2, 1980. The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 8.

STATEMENT

1. Edmond Semancik operates an electric overhead crane at petitioner's Allenport, Pennsylvania steel plant.[1] Semancik had operated the crane for three years, and prior to the incident herein, had

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[1] The crane is used to load and unload steel pipe from railroad cars and to move steel pipe weighing as much as 7½ tons throughout the building. The crane is attached to a bridge that is equipped with wheels to permit it to move along two parallel rails, approximately 115′ apart and 30′ above the floor. The steel pipe is carried over the heads of approximately 35 employees who work on the production floor (Pet. App. 6a).

never refused to perform his job for safety or other reasons (Pet. App. 6a; R. 68a).[2]

On the morning of September 19, 1977, Semancik observed that the crane's wheels were bumping as they rolled on the rails, causing the load of pipes to swing on the cable as the crane moved. Semancik stopped the crane to investigate and discovered that there was a hole, or spall, in the tread of one of the wheels[3] (Pet. App. 7a; R. 76a-78a). Semancik believed that the hole caused the bumping when it came into contact with the rail, and that the bumping could cause the loads of pipe to sway and fall from the hoist cables, resulting in injury to himself or the employees on the production floor (Pet. App. 7a; R. 95a-96a, 77a). Semancik notified his shift foreman of the problem and asked that the wheel be changed (Pet. App. 7a; R. 78a, 95a-96a). The crane repairman agreed to change the wheel, but later told Semancik that shop foreman Michaels had ordered that the wheel not be changed and that Semancik operate the crane as it was (Pet. App. 8a; R. 79a-80a, 423a-424a). Semancik and the two hookers[4] working with him on the production floor that morning then went to explain the situation to Michaels, who chastised Semancik for holding up production and ordered Semancik to operate the crane or go

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[2] "R." refers to the Joint Appendix filed in the court of appeals.

[3] Semancik had never seen a hole in a crane wheel. Semancik did not know that this wheel had been removed from the crane in June 1977, when management discovered the hole, but reinstalled on July 31, 1977, when the axle of the replacement wheel broke (Pet. App. 7a, 14a; R. 78a).

[4] "Hookers" attach the loads of pipe onto the crane's hoisting cables (Pet. App. 6a n.6).

home (Pet. App. 8a-9a; R. 80a-82a, 369a-370a). At that point, Semancik declared that he was invoking his right, under Section 14(C) of the collective bargaining agreement, not to work on an unsafe job (Pet. App. 9a; R. 82a, 330a, 423a).[5]

Semancik returned to the crane with the crane repairman and the repair foreman, and operated the crane while they observed the wheel (Pet. App. 10a; R. 83a, 330a). The repair foreman told Semancik that he believed that the wheel was safe, but that the rails appeared slippery and needed to be sanded (Pet. App. 10a-11a; R. 331a-332a). Thereafter, the rails were sanded and the wheels were realigned, but the wheel was not changed (Pet. App. 12a). The repair foreman reported that he believed the crane was safe for operation, and the shift foreman ordered Semancik back to work. When Semancik again invoked his contractual right not to work on the unsafe crane, he was suspended (Pet. App. 11a; R. 84a, 207a-208a, 332a-333a). Semancik immediately called

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[5] In pertinent part, the contract provides that employees "who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question" have the right to "[r]elief from the job or jobs, without loss to their right to return to such job or jobs, and, at Management's discretion, assignment to such other employment as may be available in the plant; provided, however, that no employee, other than communicating the facts relating to the safety of the job, shall take any steps to prevent another employee from working on the job, provided he first reports the matter to his committeeman or foreman. Should either the Management or the Arbitrator conclude that an unsafe condition within the meaning of this Section existed and should the Employee not have been assigned to other available, equal or higher-rated work, he shall be paid for the earnings he otherwise would have received" (Pet. App. 4a-5a).

his union president to inform him about the problem and to request that he come to the plant (Pet. App. 11a; R. 84a, 125a-126a). Thereafter, Semancik explained to the general foreman that his refusal to operate the crane was based on Section 14(C) of the contract. The general foreman reiterated that Semancik was suspended, and ordered a replacement crane operator (Pet. App. 11a, 15a; R. 84a, 154a-157a).

The union president arrived and advised Semancik of his right to tell the replacement about the unsafe condition. Semancik explained the problem to the replacement, and, after inspecting the wheel, the replacement decided that he too would assert his contract right not to operate the crane (Pet. App. 15a n.21; R. 84a-85a, 127a-128a, 155a).[6] A second replacement, Francis Roberts, was summoned. After listening to Semancik's explanation, Roberts agreed that the crane would be unsafe and dangerous to the hookers as they loaded pipes onto railroad cars, and invoked his contract right not to operate the crane. Roberts was then suspended (Pet. App. 15a-16a; R. 87a, 106, 115a-120a, 391a). Finally, a third replacement arrived and was informed by the union grievance committeeman about the hole in the wheel as well as the suspensions of Semancik and Roberts. After being assured by management that the crane was safe, this replacement decided to operate the crane, but only at a slow speed (Pet. App. 18a; R. 392a-394a, 405a-406a).[7]

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[6] This replacement was not suspended because he was a new employee and was not qualified to operate the crane (Pet. App. 15a n.21).

[7] In the meantime, the union president left the plant to file a safety complaint with OSHA (Pet. App. 22a; R. 134a-135a).

At a subsequent disciplinary hearing, Semancik and Roberts were given additional 30-day suspensions on the grounds that no hazardous condition existed and that the employees had been unreasonable in refusing to accept management's assessment that the crane was safe to operate (Pet. App. 20a-21a).

2. The Board, adopting the decision of the Administrative Law Judge, found that Semancik and Roberts were engaged in activity protected by Section 7 of the Act, 29 U.S.C. 157, when they invoked Section 14(C) of the collective bargaining agreement and refused to operate the crane. In so holding, the Board rejected petitioner's contention that the crane operators had acted unreasonably in refusing to work because they had disagreed with management's opinion that the crane was safe to operate (Pet. App. 24a). The Board first found that the contract required only that the operators possess an honest belief that the working condition was unsafe (Pet. App. 24a-26a). Secondly, the Board concluded that, even if the contract required reasonable grounds to believe that the working condition was unsafe, Semancik and Roberts had shown such grounds (Pet. App. 27a; footnote omitted):

> Manifestly, continued use of the spalled wheel could lead to further deterioration and bumping and slipping, as [petitioner's] witnesses readily conceded. In view of Semancik's competence and long experience in the operation of the crane, I find that his fears for the safety of the crane and the consequences resulting from the crane's continued operation if the spalled wheel were not changed were not arbitrary or capricious but furnished a reasonable basis for his decision to assert his Section 14(C) contractual right to be relieved of his job he regarded to be unsafe. Indeed, confirming the reasonableness of Seman-

> cik's evaluation and belief respecting the dangerous condition of the spalled wheel is the fact that the [petitioner] itself had removed the wheel from the crane because of a spall about 3½ months before the September 19 events here involved only to reinstall it 7 weeks later when a replacement for the new wheel was needed and another spare wheel was not available, although, to be sure, Semancik was not aware of these wheel changes. Moreover, on October 9, the spalled wheel was again replaced with a new carbonized wheel. The fact that another craneman ultimately was willing to, and did operate the crane in place of Semancik does not retract [*sic*] from Semancik's sincerely-held and reasonable belief that the spalled wheel created a condition rendering the crane unsafe "beyond the normal hazard inherent" in its operation.

Accordingly, the Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by disciplining Roberts and Semancik (Pet. App. 28a-29a, 31a).[8] The Board ordered that the employees be made whole for any loss of earnings they may have suffered as a result of their suspension (Pet. App. 30a-31a, 33a).

3. The court of appeals upheld the Board's finding that the suspension of Semancik and Roberts violated Section 8(a)(1) of the Act (Pet. App. 39a). Initially,

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[8] The Board also found that the suspensions were violative of Section 8(a)(3) of the Act (Pet. App. 31a) and that petitioner violated Section 8(a)(1) of the Act by making certain coercive statements to employees (Pet. App. 31a). The court of appeals dismissed both of these findings as not supported by substantial evidence (Pet. App. 55a-58a). No issue concerning those findings is raised here.

the court rejected petitioner's contention that the controversy should not be decided by the Board, but by arbitration. The court noted that the existence of an arbitrable issue does not eliminate the Board's jurisdiction to adjudicate unfair labor practices (Pet. App. 45a-46a). Moreover, the court found that the Board properly declined to defer to arbitration here because petitioner had never requested the Board to do so, as required by Board practice (Pet. App. 47a-48a).

The court rejected petitioner's contention that Semancik and Roberts were not engaged in concerted activity (Pet. App. 50a-51a; footnotes and citations omitted):

> The record reveals that this incident involved more than individual refusals by Semancik and Roberts. When Semancik invoked his rights under Section 14(C) of the collective bargaining agreement, he declared that the safety of the employees working on the floor below was endangered, as well as his own. When he went to discuss the condition of the wheel with Michaels, the electric shop foreman, two other employees working with the crane accompanied him. Roberts spoke to Semancik about the possible hazard before he decided to refuse to operate the crane. Thus, from the beginning there was some group action by fellow workers in the interest of employee safety. Further, the union was also involved. Semancik contacted his union representatives before he left the building on the morning of September 19, 1977. At his request, the union president and union grievance committeeman came to the site of the incident. The union represented Semancik and Roberts at their hearings on September 23. Additionally, the union president filed a complaint with the Occupational Safety

> and Health Administration concerning the potential danger the wheel created for all the employees. On this record it would be fair to say that Semancik and Roberts acted here as spokesmen for the safety of all the employees, and that the employees—as indicated by the union's actions—shared this safety concern.

The court also found that "there is substantial evidence to support the ALJ's findings that, in light of Semancik's experience and skill, the crane operators' refusal to work for safety reasons * * * had a reasonable basis in fact and did not constitute a breach of contract" (Pet. App. 54a; footnote omitted).

ARGUMENT

1. Petitioner contends that its action in suspending Semancik and Roberts was not an unfair labor practice because the refusal to operate the crane was not concerted activity protected by Section 7 of the Act[9]—and that this case therefore involves only a contract dispute over which the Board has no jurisdiction.[10] Petitioner argues (Pet. 24-29) that

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[9] Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) implements that guarantee by making it illegal for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *."

[10] Petitioner apparently does not dispute (Pet. 15-17) the settled proposition that the Board has jurisdiction to construe collective bargaining agreements in order to adjudicate an unfair labor practice. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969); *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421, 428-429 (1967).

there was no concerted activity here because Semancik's and Robert's refusals to operate the crane were "isolated actions of individual employees" (Pet. 25) with no expression of "any concern for the safety of other employees; nor did they attempt to or express any desire to warn other employees of an alleged danger" (*ibid.*). This assertion merely challenges the contrary finding of the Board, which was sustained by the court of appeals. As the court found, "Semancik and Roberts acted here as spokesmen for the safety of all the employees" (Pet. App. 51a); their actions were "for mutual aid or protection" (*id.* at 52a).[11]

Petitioner also contends (Pet. 18-23) that the refusals to operate the crane violated the no-strike clause of the contract and were therefore outside the protection of Section 7. It claims the employees "had no basis for continuing to refuse to operate the crane after management corrected what it found to be the problem * * *" (Pet. 22). Again, however, petitioner merely quarrels with the Board's finding, upheld by the court of appeals, that the employees reasonably and in good faith believed that the crane

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[11] *Kohls* v. *NLRB*, 629 F.2d 173 (D.C. Cir. 1980), relied on by petitioner (Pet. 26-29), is inapposite. There, the court found that the employee in question had acted alone, for his own benefit and without the assistance of the union; concerted activity could be found only in the circumstance that the employee sought to enforce the collective bargaining agreement. Here, the court of appeals expressly observed (Pet. App. 52a n.14) that, since there was "ample evidence in the record to support the finding that the refusals to operate the crane were not solitary acts by individual employees, we need not reach the issue of constructive concerted activity"—the issue in *Kohls*.

was unduly dangerous and properly invoked Section 14(C) of the agreement.[12]

Accordingly, the issue presented in this case is whether the Board's findings are supported by substantial evidence, an issue which does not warrant consideration by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[13]

2. Petitioner contends (Pet. 29-30), that Semancik and Roberts are not entitled to receive back pay for the period between September 19 and October 9, 1977, the date petitioner finally replaced the wheel, because until it was replaced they would not have been willing to operate the crane even if they had been asked. The Board concluded (Pet. App. 30a n.37), however, that, but for the petitioner's wrongful suspensions, they might have returned to work the next day; accordingly, the Board held that "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those for which it was immune," citing *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938). This conclusion was not unreasonable, for, regardless of the statements the two may have made in defending their position at the hearing, it is impossible to know what their

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[12] Section 502 of the Labor-Management Relations Act, of 1947, 29 U.S.C. 143, which provides, in pertinent part, that "the quitting of labor by an employee * * * in good faith because of abnormally dangerous conditions for work * * * [shall not] not deemed a strike," is not involved here. Since the employees properly invoked Section 14(C) of the agreement, no strike in breach of contract occurred (Pet. App. 28a n.35).

[13] As the court of appeals noted (Pet. App. 46a-48a), while the presence of contractual issues does not preclude the exercise of jurisdiction, the Board may choose to defer to the arbitration process. Petitioner never requested deferral (Pet. App. 47a-48a).

positions might have been had the Company granted them relief from the job rather than reacting to their request with hostility and unlawful discipline. Moreover, had they not been suspended, they might have been assigned to alternative work, as is contemplated by the contract in such situations. Petitioner failed to show that the men would not have returned to work had they not been suspended. The Board's backpay order is therefore well within the proper scope of its discretion, for it effectuated "a restoration of the situation, as nearly as possible, to that which would have obtained but for" petitioner's violation of the Act. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1980

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-583

In The Supreme Court of the United States

OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER WHEELING-PITTSBURGH STEEL CORPORATION

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29 December 1980

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Rodak:

re: Wheeling-Pittsburgh Steel Corporation v
National Labor Relations Board, No. 80-583

Please note the enclosure with this letter offered in further support of the position of the Petitioner in the case of Wheeling-Pittsburgh Steel Corporation v National Labor Relations Board, No. 80-583. The enclosure is a copy of Krispy Kreme Doughnut Corporation v N.L.R.B., a case recently decided by the United States Court of Appeals for the Fourth Circuit. The Krispy Kreme case narrates once more the troublesome conflict among the Circuits on the interpretation of "concerted activity" under Section 7 of the National Labor Relations Act. The Petitioner in the instant case submits that the confusion surrounding "concerted activity" will remain until and unless this Honorable Court addresses the issue.

In Krispy Kreme the Fourth Circuit cites the Third Circuit's decision in Wheeling-Pittsburgh Steel Corporation v N.L.R.B., 618 F.2d 1009 (3d Cir. 1980), the instant case. (Footnote 4, Krispy Kreme). The citation reveals that the Fourth Circuit has relied upon the Third Circuit's version of the facts in the present case. The Petitioner has vehemently contested the factual findings as having no foundation in the record and being an invention of the National Labor Relations Board, first appearing in the Board's Brief in the lower court. Thus, the Wheeling-Pittsburgh case is now being cited in a misleading manner in an erroneous proposition.

Finally, the split in the Circuits on the "concerted activity" issue has been discussed in a recent issue of the Legal Times of Washington, December 8, 1980, "'Constructive Concerted Activity': Legal Nightmare", Smith and Lohman, pp. 19-21. The article focuses upon the different

postures of the Circuit Courts and the Board in connection with interpretation of Section 7.

The Petitioner reemphasizes that the instant case deals with a split among the Circuit Courts on interpretation of Section 7 of the National Labor Relations Act, a statute of major nation-wide significance in the realm of industry peace. The Petitioner prays this Honorable Court grant the Petition for a Writ of Certiorari in this case.

Very truly yours,

Donald L. Dotson

lb

Enclosures

DECISION OF FOURTH CIRCUIT IN KRISPY KREME DOUGHNUT CORP. v. NLRB
(TEXT)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-1645

Krispy Kreme Doughnut Corp., Petitioner,
-versus-
National Labor Relations Board, Respondent.
Bakery, Confectionery and
Tobacco Workers International
Union, AFL-CIO, CLC, Intervenor.

On Petition for Review of an Order of the National Labor Relations Board.

Argued: August 21, 1980. Decided: December 8, 1980

Before RUSSELL, WIDENER and PHILLIPS, Circuit Judges.

H. Lane Dennard, Jr. (Jonathan P. Pearson, Ogletree, Deakins, Smoak, Stewart & Edwards on brief) for Petitioner; Lafe E. Solomon, National Labor Relations Board (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Kenneth B. Hipp, Deputy Assistant General Counsel on brief) for Respondent; Judith E. Kincaid (Shelley Blum, North Carolina Labor Law Center on brief) for Intervenor.

RUSSELL, CIRCUIT JUDGE:

The petitioner-employer seeks review of a Board order finding the discharge of the employee Terry Boggs by the petitioner violative of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §151, et seq., and requiring reinstatement and back pay. 1/ We deny enforcement of the order.

Terry Boggs was initially employed by the petitioner on August 10, 1976 and was discharged on July 31, 1978, almost two years later. During that period he had filed four workmen's compensation claims and one lawsuit against his employer. In addition, he had been unable to work for almost four months during this period. It is the petitioner's position that all the claims were "of dubious validity." One of his claims alleged injuries to his shoulder sustained when he entangled his arm in a stair rail at work, and another claim was for neck and back injuries, which occurred when he fell over backwards in a swivel chair. His final claim on July 27, 1978 related to chest pains allegedly experienced by him at work, which he claimed were due to conditions in his working environment. At this point, the personnel director of the petitioner investigated Boggs' latest complaint and his accident and claims record, as well as his working conditions. Following this, Boggs was discharged. The reason assigned by the petitioner for the discharge was that Boggs, by his record as an employee, had shown a careless attitude towards safety and "a preoccupation with filing claims for compensation."

A complaint under the Act was then issued by the National Labor Relations Board, and, after a hearing, the Administrative Law Judge concluded that "[petitioner herein] violated Section 8(a)(1) of the Act on July 31, 1978, by discharging Terry Boggs because of his expressed intention to file a workmen's compensation claim" 2/ on account of his complaints on July 27, 1978, and "that Boggs' refusal to forebear from filing a claim for workmen's compensation falls within the protected ambit of Section 7 and * * * for that of the Administrative Law Judge were accepted by the Board, which, on that basis, entered the order challenged by the petitioner.

The issue posed by petitioner's challenge to the Board's order is whether, as a matter of law under the Act, discharge of an individual employee for refusing to forego a workmen's compensation claim constitutes protected "concerted activity" authorizing the issuance of a cease-and-desist order under Section 7 of the Act. (29 U.S.C. § 157). For purposes of this appeal only it may be considered as undisputed that Boggs' discharge was as found by the Board. There is thus no factual issue, only a legal issue requiring a judicial construction of the term "concerted activity" in the Board's authorization statute. If such a discharge for the reason assigned is not "concerted activity," enforcement should be denied. Conversely, if it is, enforcement should be ordered. On that basis we proceed to a construction of the term "concerted activity" under Section 7 of the Act.

So far as this proceeding is concerned, Section 7 protects an employee from retaliation by his employer only on account of employee action which may be found to be "concerted activities for the purpose of collective bargaining or other mutual aid or protection." "Concerted activity," under the statute, read literally, would appear to require more than a single participant. And some authorities have held just that. N. L. R. B. v. C & I Air Conditioning, Inc., 486 F. 2d 977, 978, (9th Cir. 1973); N. L. R. B. v. Northern Metal Company, 440 F. 2d 881, 884 (3d Cir. 1971); see, Note, Constructive Concerted Activity and Individual Rights: The Northern Metal- Interboro Split, 121 U. Pa. L. Rev. 152, 153 (1972). 3/

There are however, other cases, supported by scholarly comments, which find too narrow and artificial this construction of the term "concerted activity," a term which they characterize as more "a term of art rather than a factual description." Anchortank, Inc. v. N. L. R. B., 618 F. 2d 1153, 1160 (5th Cir. 1980); cf., Note The Requirement of "Concerted" Action under the NLRA, 53 Colum. L. Rev. 514, 517 (1953). These decisions point to the words in the statute which qualify, or make clear the scope of, the term "concerted activities" ("for the purpose of * * * mutual aid or protection")

1/ 245 NLRB No. 135 (1979)

2/ There was some contention that Boggs' discharge was related to his supposed union activities. The Administrative Law Judge found no basis for this claim and dismissed it. Thus, the only basis for a violation of the Act in this case related to the finding that Boggs was discharged because he refused to forego filing a workmen's compensation claim.

3/ In C & I Air Conditioning, the Court said at p. 978:

> Our circuit has indicated that the term "concerted activity" means that the employee must be acting "with or on behalf of other employees, and not solely by and on behalf of the discharged employee himself."
>
> In Northern Metal, the Court said (p. 884):
>
> Webster's New International Dictionary (2d ed. 1947) defines "concert" as "agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action" and "concerted" as "mutually contrived or planned; agreed on." We do not believe the purpose of the Act would be served by expanding the limits of Mushroom to include activity which could be considered "concerted" only in a fictional sense.

and, taking the two phrases together ("concerted activities" and its qualifying phrase "for the purpose of • • • mutual aid or protection"), conclude that it is the sense and intent of the statute that an action by a single employee may be treated as "concerted activity," even though participated in by a single employee, provided, but only provided, the action looks to group rather than mere individual action, and includes "some element of collective activity or contemplation thereof," 4/ or it is shown "that the individual in fact was acting on behalf or, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense." 5/

It will not satisfy this condition for Board action under Section 7 that an employee's complaint may be directed at working conditions which affect all employees; "[i]t is . . . necessary . . . that the employee's actions themselves at least contemplate such group activity [in order to support Board jurisdiction]. As was explained in Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967), 'in order to prove a concerted activity under Section 7 of the Act, it is necessary to demonstrae that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint.'" Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d 23, 28 (7th Cir. 1980). This construction of the statutory language determinative of when the action of a single employee will be deemed "concerted activity" within Section 7, is illustrated by Mushroom Transportation Company v. N.L.R.B., 330 F.2d 683, 685 (3d Cir. 1964):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees. 6/

This definition of "concerted activity," as applied to the action of a single employee was recently reaffirmed in Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d at 28, in which the finding of the Board that the conduct of an employee complaining of working conditions in that case constituted "concerted activity" within the meaning of Section 7.

We appear to have adopted this same construction of the statutory language. Thus, in Owens-Corning Fiberglas Corporation v. N.L.R.B., 407 F.2d 1357 (4th Cir. 1969), we enforced an order of the Board finding "concerted activity" in the action of two employees in preparing and seeking from fellow employees signatures on a petition complaining of working conditions. In doing do, however, we said:

> Their activity (i.e., that of the two employees) both prior and subsequent to the actual signing of the petition was plainly intended to enlist the support and assistance of other employees for the purpose of correcting what the workers thought to be an inadequacy in working conditions. The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other. 7/ Id. at 1365 (Italics added)

This distinction under Section 7 between individual action "intended to enlist the support and assistance of other employees" and action "for the benefit of other employees only in a theoretical sense" is illustrated by the different results in our cases of Joanna Cotton Mills Co. v. National Labor Relations Bd., 176 F.2d 749 (4th Cir. 1949) and Owens-Corning Fiberglas Corp. v. N.L.R.B., supra. In Joanna Mills, it was said that it is "the 'purpose' of the activity" of the employee that determines whether the complaint of the employee is within Section 7 and that such "purpose" "must be the mutual aid or protection of the employees." 176 F.2d at 153. Because it concluded that the complaint of the employee, though involving working conditions, represented a personal grievance asserted as such and was not "for the purpose of inducing or preparing for group action to correct a grievance or a complaint," 8/ the Court in that case found that there was not "concerted activity" within Section 7. In Owens-Corning Fiberglas, on the other hand, the action of the employees was "plainly intended to enlist the support and assistance of other employees for the purpose of correcting . . . an inadequacy in working conditions." 407 F.2d at 1365. Under those circumstances, the Court did find "concerted activity."

The Board in effect concedes that there is no evidence that the action of the solitary employee in this case intended or contemplated any group activity or that he was "in fact . . . acting on behalf of or as representative of, other employees;" at most his action can be said to have been "for the benefit of other employees only in a theoretical sense." 9/ Thus, his actions did not satisfy the requirements as stated in Mushroom, Owens-Corning Fiberglas and similar cases as a basis for a finding of "concerted activity" in the instance of a complaint by a single employee.

It is true, as the Board argues, that a number of courts, following the rule announced in N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), have held "that complaints by an individual employee in an effort to enforce provisions of a collective bargaining agreement amounted to concerted activity under § 7 of the Act, even in the absence of interest by fellow employees in the complaints." 10/ The rationale for this rule, as stated by the Court both in ARO, Inc. v. N.L.R.B., 596 F.2d at 716, and in N.L.R.B. v. C & I Air Conditioning, Inc., 496 F. 2d at 976, as well as by the Board itself in Bunney Bros.

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4/ Wheeling-Pittsburg Steel v. N.L.R.B., 618 F.2d 1009, 1017 (3d Cir. 1980); Dreis & Krump Mfg. Co., Inc. v. N.L.R.B., 544 F.2d 320, 327 (7th Cir. 1976); N.L.R.B. v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973); Mushroom Transportation Company v. N.L.R.B., 330 F.2d 683, 685 (3d Cir. 1964).

5/ ARO, Inc. v. N.L.R.B., 596 F.2d 713, 717 (6th Cir. 1979).

6/ This conclusion was recently restated by the same court in Wheeling-Pittsburgh Steel v. N.L.R.B., 618 F. 2d 1009. In that case the complaint was by two employees but their action was supported by "the action of fellow workers and union representation" and involved "from the beginning . . . some group action by fellow workers in the interest of employee safety." Id. at 1017. (Empahsis added)

The decision in Mushroom has been repeatedly followed by other circuits, including our own.

7/ A similar case is Community Hosp. of Roanoke Val., Inc. v. N.L.R.B., 538 F.2d 607 (4th Cir. 1976). In that case, two employees engaged in a union organizing effort at the Hospital had gone on the radio to state their reasons for their unionization effort. For this they were discharged. The Board found that the action of the employees, which resulted in their discharge was action intended for the common benefit and mutual protection of all employees and not in the promotion of an individual grievance. It accordingly met the test of Mushroom and Owens-Corning Fiberglas. The fact that the conduct was "outside the immediate employee-employer relationship" was unimportant; the critical fact was that it was action related intimately to efforts by way of group activity to improve working conditions. Eastex, Inc. v. NLRB (1978), 437 U.S. 556, 565.

8/ See Pelton Casteel, 627 F.2d at 28.

9/ See ARO, Inc. v. N.L.R.B., 596 F.2d at 717.

10/ ARO, Inc. v. N.L.R.B., 596 F.2d at 716.

Construction Co., 139 NLRB 1516, 1519 (1962), is that individual action seeking to implement the terms of a collective bargaining agreement is merely an extension of the concerted activity which gave rise to the agreement in the first place (constructive concerted activity). 11/ This reasoning, however, has not been accepted by all courts. In N. L. R. B. v. Northern Metal Company, 440 F.2d at 884-85, the Court, branding the finding of "constructive concerted activity" in Interboro as a pure "legal fiction," said it was "unwilling to adopt such a fiction." And in Buddies Supermarkets, Inc., supra, at 719-20, the Court declared "that the Interboro decision has not received wide acceptance." 12/ It is, however, unnecessary for us to determine in this case whether Interboro is to be applied in this Circuit, since there is no collective bargaining agreement and, therefore, no foundation for a finding of "constructive concerted activity" under the rationale adopted in Interboro.

And the Board recognized that this case did not qualify under Interboro because of the absence of a collective bargaining agreement, but it asked that we extend the fiction of "constructive concerted activity" found in Interboro by holding that an individual employee is engaged in "concerted activity" whenever he or she acts in a matter which arises out of an employment relationship and may be of common interest to other employees since it is reasonable to presume that other employees, if they know of the complaint, would have joined in, thereby supporting the essential element of group or concerted action. It would apply this holding which relies on a presumption of group conduct and participation, particularly in situations where the employee's complaint relates to federal or state work safety or employment compensation statutes. It argues that the adoption of such a rule would create a presumption, which had the effect of merely shifting the burden of proof. It is significant, though, that the Board confesses in its brief in this court that no proceeding in which it has proposed this theory has the Board suggested "the precise manner whereby an employer might obtain evidence to rebut the presumption" that other employees identified with the complaint. It follows, therefore, that the Board would set up a presumption which in practical effect it would be impossible for an employer to rebut and thus would constitute an irrebuttable presumption.

The Board cites no circuit decision supporting its theory of presumed "concerted activity" in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action" meeting the threshold requirement under Section 7. N. L. R. B. v. C & I Air Conditioning, Inc., supra (complaint covering safety on the job site). See, also, N. L. R. B. v. Dawson Cabinet Co., Inc., supra (violative of the Equal Pay Act). Thus, in N. L. R. B. v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980), the Court said:

> We disagree that the filing of a safety complaint in the circumstances of the case constituted a protected concerted activity. The Board found that Mortensen had acted alone in filing the complaint; however, it relied upon Alleluia Cushion Co., Inc., 221 N. L. R. B. 999 (1975), to find concerted activity. In Alleluia Cushion the Board found that when an employee acts alone in filing a safety complaint, the consent of the other employees will be implied and the activity will be deemed concerted. This is an extension of the principle established in NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), that "activity engaged in by an individual employee acting alone which was directed to enforce or implement the terms of a collective bargaining agreement will be deemed concerted activity within the meaning of §7." NLRB v. Dawson Cabinet Co., Inc., 566 F.2d 1079, 1082 (8th Cir. 1977). The rationale of the decision was that the implementation of the agreement by the employee was an extension of the concerted activity giving rise to the agreement.
>
> NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973) governs the disposition of this issue. It involved, as this case does, the filing of a safety complaint. Although it predated Alleluia Cushion, without deciding the validity of Interboro, we refused to extend it to situations where there was no collective bargaining agreement involved. Such an agreement is essential because it is the source of the employee's claimed rights. NLRB v. C & I Air Conditioning, Inc., 486 F.2d at 979. Therefore, we must reject the Board's finding that Mortensen engaged in protected concerted activity.

And this conclusion as stated in Bighorn Beverage is easily understood. "Concerted activity" is an essential predicate, in effect a jurisdictional requirement, for Board action under the Act in a case such as this. The burden of establishing by proof such essential predicate to quasi-jurisdiction rests on the Board. It would be odd, indeed, if this essential quasi-jurisdiction predicate might be supplied by a presumption admittedly resting on no factual base but predicated on a purely theoretical assumption. In essence, what the Board would do under its argument would be to reverse the trial procedure in this context by requiring the employer in any proceedings under the Act to rebut the Board's authority to act before the Board would be required to prove its quasi-jurisdictional basis for the proceeding. We cannot accept such a novel argument which goes far beyond the rationale on which Interboro was grounded. In our opinion, the Board completely failed to establish "concerted activity" in this case and enforcement is accordingly denied.

ENFORCEMENT DENIED.

11/ See also, N. L. R. B. v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980), where the Court said:

> The rationale of the decision [in Interboro] was that the implementation of the agreement by the employee was an extension of the concerted activity giving rise to the agreement.

Often courts have read in Interboro the rationale that, since the treatment of an individual employee's complaint or grievance under a collective bargaining agreement will necessarily have an effect on other employees covered by the agreement in their conception of the values of the collective bargaining agreement an individual employee's complaint in those circumstances "may be deemed to be for concerted purposes." Again, though, as we later indicate, this point is unimportant in this proceeding since Interboro only applies where there is a collective bargaining agreement. See Anchortank, Inc. v. N. L. R. B., supra, 618 F.2d at 1160-61; N. L. R. B. v. Ben Pekin Corporation, 452 F.2d 205, 206-7 (7th Cir. 1971).

12/ To the same effect is N. L. R. B. v. Dawson Cabinet Co., Inc., 566 F.2d 1079, 1084 (8th Cir. 1977).

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No. 80-583

In The Supreme Court of the United States

OCTOBER TERM, 1980

WHEELING-PITTSBURGH STEEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER WHEELING-PITTSBURGH STEEL CORPORATION

THE EVIDENCE

In its Brief in Opposition to the Petition for Certiorari, the Board proposes an additional issue on the question of "substantial evidence." Petitioner concurs in this issue and urges that the Board's evidence in support of its findings and conclusions be reviewed. Most of Petitioner's 42 Exceptions to the Decision of the Administrative Law Judge concerned the lack of support in the record for his findings and conclusions which were summarily adopted by the Board and the Court of Appeals. His disregard of the Company's uncontroverted evidence on critical issues should also be reviewed. The Board has also made several unsupported statements of fact in its Brief to this Court:

1. In footnote 1 of its Brief, the Board states that steel pipe is carried over the heads of 35 employees.

Loads are not carried over employees' heads and there is no evidence to support the Board's statement. Carrying loads over employees is contrary to safety practice. Specific instructions prohibit it, and procedures and devices (lights and horns) are designed to prevent such occurrences.

2. At page 2, the Board attempts to create "concerted activity" by saying Semancik *and the hookers* went to explain the situation to Michaels. There is no evidence that the hookers were at any time allied with Semancik or considered themselves to be in any danger. The same is true of the other employees who were put out of work by Semancik's refusal to operate the crane. This proposition was never advanced at the trial, the only reasonable inference, if any, being that the hookers had nothing to do and followed along to see what the outcome would be, that is, whether they would be working. There is no evidence that they entered into the discussion or showed any sign of protest. To the contrary, they continued working as soon as crane service was restored. The theory that they were in concert with Semancik appeared for the first time in the Board's Brief to the Court of Appeals.

3. The Board's Brief refers to the "unsafe crane." Not only is there no evidence that the crane was unsafe, but there is substantial evidence that the crane was safe and that there was no reasonable basis for refusing to operate it. At the trial the Board was satisfied to attempt to show only that Semancik and Roberts *believed* it to be unsafe.

4. At page 4 of its Brief, the Board states that "Roberts agreed that the crane would be unsafe and dangerous to the hookers as they loaded pipes onto railroad cars . . ." This is another attempt to create "concerted activity." Roberts never made such a statement. There is nothing in the record to support

the Board's statement even as a characterization of statements by Roberts or his reasons. To the contrary, there is nothing to suggest that he acted other than on his own behalf. *The Board's own witness,* Miles, testififed as follows on cross examination concerning the refusals to operate the crane (181a):

> JUDGE BISGYER: Let's get back to Mr. Semancik. Do you honestly believe that Mr. Semancik did not believe that the crane was unsafe?
>
> THE WINTESS: Yes sir, I do, based on his actions and his position at the time.
>
> Q (By Mr. Dotson) How about Mr. Roberts?
>
> A I believe — are you asking me my opinion?
>
> Q Yes?
>
> A I believe Mr. Roberts was coerced by Mr. Semancik, that's the reason he took the position that he took.
>
> Q Do you think his position was unreasonable?
>
> A Yes sir, I do.
>
> Q Do you think he had a real basis to have an opinion about whether the crane was safe?
>
> A No sir, I don't. (The witness goes on to explain the factual basis for this testimony and to totally contradict the testimony of Semancik.)

The Board also attempts to create "concerted activity" when it quotes the Court of Appeals at pages 7-8 of its Brief. The quote reveals that the Court relied on the Administrative Law Judge's findings that Semancik had declared a concern for the safety of his fellow employees. The record proves this finding to be devoid of any basis in evidence. Accordingly the Board states on page 9 of its Brief that the Company challenges the contrary finding of the Board and the Court of Appeals; the Board cannot and does not state that the Company's assertion is contrary to the evidence.

The Company's evidence is redundant that a spall on a welded wheel is nothing more than ordinary wear and tear and presents no risks beyond those normally inherent in the job. On this point, the Board presented only the uncorroborated opinions of the two employees who were suspended. The possibility that the wheel might eventually wear out as the result of the spall or any other reason is also normally inherent in the job and presents no basis for refusing to work. The Company is fully within its rights to install and operate a wheel such as the one in question and to expect its employees to operate the crane with such a wheel. The Board presented neither the evidence nor the expertise to hold otherwise.

5. The Court of Appeals, cited in footnote 11 of the Board's Brief, is quoted as finding, like the Administrative Law Judge, that there is "ample evidence in the record to support the finding that the refusals to operate the crane were not solitary acts by individual employees . . ." The conclusion of the Administrative Law Judge in this regard is simply not supported by the record. The same is true of the conclusion that there was objective evidence of any unsafe condition within the meaning of the labor agreement or relevant

statutes.

Contrary to the Board's assertion, an examination of the evidence in this case reveals circumstances significantly identical to those in *Kohls v. NLRB*, 629 F. 2d 173 (D.C. Cir. 1980).

The Board cites *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) as authority for its *ipse dixit* treatment of this case. *Universal Camera* does not, however, foreclose examination of the Board's determinations with respect to the evidence nor does it relieve the Board of the burden of proof and the laws of nature. The analysis of the 8th Circuit in *NLRB v. Fruin-Colnon Construction Co.*, 330 F. 2d 885 (1964) is equally applicable to this case:

> In short, the uncontradicted documentary, photographic and other valid evidence of the physical facts, complementing the reasonable inference of nomalcy of the protested working conditions drawn from the credited, disinterested testimony of Williams (not to mention the considerable, supportive testimony of respondent's witnesses which the Examiner discredited *in toto*) compels our conclusion that the Board's determination that abnormally dangerous circumstances justififed the walkout is based upon isolated testimony of the alleged discriminatees and unreasonable inferences which are unsubstantial considering the record as a whole. (footnote and citations omitted) Furthermore, credibility findings of the Board contradictory of substantial evidence of the laws of nature and undisputed documentary testimony need not rigidly control appellate review of all the evidence. (citation omitted)

JURISDICTION AND DEFERRAL

The Board is either confusing the issue of jurisdiction with the issue of deferral to arbitration or is raising an additional issue. The Company has raised in its Petition and from the beginning of this case the issue of the Board's jurisdiction over a dispute concerning nothing more than rights under the collective bargaining agreement. Deferral is a separate issue having to do with the Board's policy of "deferring" to arbitration decisions for the resolution of violations of the labor laws if the decision and the procedure meet various and frequently changing criteria. At the time this case arose and was tried, it was the Board's stated policy not to defer in cases involving alleged violations of employees' Section 8(a)(1) and (3) rights. The Administravite Law Judge made it clear at the beginning of the proceeding that he would not withhold Board action pending arbitration (19a):

> JUDGE BISGYER: Well, let's proceed. There hasn't been an award, and if there were an award, and the General Counsel had claimed that the award was repugnant to the rights accorded parties under the Act, we'd go through the procedure to determine what the facts are, and to determine whether the award coincides with the law.

The Company took the position that this case was indistinguishable from many other disputes concerning the rights under the labor agreement and should be resolved through arbitration; that whether the Company was right or wrong in its interpretation of the labor agreement and the discipline imposed is not for the Board to decide; that it certainly is not a

per se violation of the Act for the Company to impose discipline in good faith and in the absence of anti-union animus; that the Board had no jurisdiction. The following appears at the end of the Company's Trial Brief, which appears in evidence as Respondent's Exhibit 2:

> This, like almost every discipline or interpretation case, is nothing more than a routine matter for the arbitrator, who has the authority to adjust the discipline if he believes it is too severe or to determine if the Corporation or the employees misinterpreted the contract.
>
> . . . An unfair labor practice as alleged by the complainant . . . did not occur and the instant complaint must be dismissed.

The question of the Board's jurisdiction over this dispute was treated at length in the Exceptions and Brief before the Board and before the Court of Appeals.

The question of "deferral" arose while the case was pending before the Court of Appeals as a result of the Board, on its own motion, withholding action pending arbitration in another case, *Wheeling-Pittsburgh Steel Corporation*, NLRB Case No. 6-CA-12875 (1980 unreported), involving similar allegations and the same statutory provisions at the same plant of Wheeling-Pittsburgh. Because of this apparent change of policy or inconsistent action on the part of the Board, the Company took the position, as an alternative to its other positions, that the Semancik-Roberts case should at least be deferred to arbitration or that it should be remanded to the Board for clarification of its deferral practices, which are in a state of ex-

treme confusion and inconsistent application. (See "Arbitrators and the Board," *57 North Carolina Law Review 91* (October 1979) in which the author concludes "I simply don't think it is possible to know at present when the Board will and will not defer to any thing.")

Contrary to the Board's representations to the Court of Appeals and its brief before this Court concerning the practice of deferral before arbitration has taken place, Wheeling-Pittsburgh is informed and believes that the Board *does* withhold action pending arbitration on an inconsistent, *ad hoc* basis with or without a specific request by a respondent. The Board is well aware of the long-standing and comprehensive arbitrability of disputes in Wheeling-Pittsburgh and the other eight companies which comprise "big steel" and have the same basic labor agreement. The Administrative Law Judge was reminded of this at the beginning of the trial (17-18a), immediately before he ruled that he would, in accordance with the General Counsel's position, proceed to hear the case. (19a, *supra)*

Wheeling-Pittsburgh does not object to the Board making an issue of deferral before this Court; however, deferral should not be confused with the more essential issue of the Board's lack of jurisdiction to hear a contract dispute, correct disposition of which would preclude reaching the deferral issue. With respect to the adequacy of the Company's compliance with the Board's purported "deferral practice" it is the Company's position that its objections to the Board's hearing the case, made throughout the proceedings, are sufficient to encompass deferral or any other grounds that would have precluded Board action. Whatever the Board's deferral practice may be, it is basic that jurisdiction may be raised at any

time and cannot be conferred even by the consent of the parties. *Smith v. Spina*, 477 F.2d 1140, 1145 (CA3, 1973)

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

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